

No. 49130-3

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

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KITSAP COUNTY, Respondent,

v.

KITSAP RIFLE AND REVOLVER CLUB, Appellant,

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APPELLANT'S OPENING BRIEF

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## I. INTRODUCTION

***Speaking of the Second amendment- “it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>1</sup>***

The Kitsap Rifle and Revolver Club (hereinafter “the Club” or “KRRC”) is a non-profit organization formally established in 1926. For the preceding 90 plus years, the Club has safely operated a shooting range and supporting facilities at the same location in Kitsap County (CP 184) with a grandfathered right to continue control of its operations.<sup>2</sup> (CP 78-79).

The Club’s operational controls include berms for the containment of projectiles, active management of shooting activities, safety training, range operations and safety procedures conducted in accordance with the Washington Firearm Range Account and Firearm and Archer Range Program established in RCW 79A.25 (CP 202-209). Its facility has an on-site environmental laboratory served by an environmental engineer. CP 184, 186. An independent safety and range operation evaluation by a small arms range expert reported that the Club’s range operates with sufficient engineering and institutional controls to protect to range users and the public. CP 210-215. In addition to shooting activities, the Club provides valuable public services such as hunter education, junior small

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<sup>1</sup>*District of Columbia v. Heller*, 554 U.S. 570, 635, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008).

<sup>2</sup>The Club initially declined to apply for a permit, alleging it was not legally required to secure a permit. (CP 75, 194). *See* p.11, *infra*.

bore Olympic style shooting, competitive shooting events, instruction on firearms maintenance, gunsmithing and cleaning.

The KRRC's long occurring activities are now highly regulated by Kitsap County's adoption of KCC 10.25, a local ordinance that imposes restrictions on a fundamental personal right<sup>3</sup> protected by the Second (2<sup>nd</sup>) Amendment to the United States Constitution. KCC 10.25 ("the Ordinance")<sup>4</sup> purports to address safety of gun ranges on its face, but it goes beyond mere regulation to "bless" the policy choices of County Commissioners made under pressure by certain citizens who do not approve of guns, at least in a general vicinity. By doing so, the County has created a "police power" by fiat in this regard, now attempting to "protect" the citizens from the Club's 90-plus years of continuous safe operation in the same location. CP 184.

Instead of objectively determining if shooting ranges in Kitsap County posed a reasonable likelihood that humans, domestic animals or property will be jeopardized, the County stepped over a very profound line by creating an ordinance which (1) abolishes the State of Washington's preemption of firearms regulation, (2) infringes on Constitutional rights,

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<sup>3</sup> The Washington Constitution vests firearm rights in the "individual citizen." WASH. CONST. art. I, § 24; *District of Columbia v. Heller*, *supra*, 554 U.S. 570, 577. Unlike the federal right, the state protects an individual's right to "bear arms in defense of himself, or the state," WASH. CONST. art. I, § 24. The protections of the 2<sup>nd</sup> Amendment bind Washington State as well. *State v. Sieyes*, 168 Wn.2d 276, 291, 225 P.3d 995 (2010).

<sup>4</sup> The enabling law, Ordinance No. 515-2014 adopted September 22, 2014 is found at **Appendix A-1**.

and (3) puts into the hands of County officials the power to change the previously safe operations of the Club. As the United States Supreme Court has observed with respect to 2<sup>nd</sup> Amendment protections: “The enshrinement of constitutional rights necessarily takes certain policy choices off the table.” *Heller, supra*, 554 U.S. at 636.

The County attempts to portray the Club as scofflaws that believe they are above the law. And the County claims that KCC 10.25 is required to protect the community. Nothing could be further from the truth. Without KCC 10.25, the County maintains all police power over the range in the form of legal actions concerning nuisance, reckless endangerment, and criminal negligence, among other things. If the Club is infringing on the individual rights of others, the County has the obligation to exercise its power reflected in Article 1 Section 1 of the State Constitution, which delineates the governments only power is to “protect and maintain individual rights.”

Not only is KCC 10.25 violative of the 2<sup>nd</sup> Amendment and its Washington State counterpart, it conflicts with the State of Washington’s preemption of the entire field of firearm regulations per RCW 9.41.290. Kitsap County has taken it upon itself to expand its “police power” using an all-inclusive and generalized goal of public safety detached from any specific harm.

The County asserts there is no direct regulation of the possession or discharge of a firearm. Because the use is regulated on land historically used as a gun range, the indirect impact is just the same: the discharge of firearms is prohibited without County approval and Constitutional rights infringed upon. Since the ultimate consequence of the enforcement of KCC 10.25 is the same, any distinction between direct and indirect regulation is without merit.

In the context of basic Bill of Rights freedoms, such a fine distinction cannot be countenanced. *E.g., Heller, supra*, 554 U.S. at 592, (“[W]e find that [the Second Amendment] guarantee[s] the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment. We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right”); *Nordyke v. King*, 319 F.3d 1185, 1196-96 (9<sup>th</sup> Cir. 2003) (“[T]he Second Amendment’s purposes strongly support the theory of an individual right to “keep and bear” arms.

Throughout this litigation, the County failed to identify evidence to show that KCC 10.25 was adopted in response to a “reasonable likelihood of harm to people, property or animals” as required by RCW

9.41.300, a qualified exemption to overall state control.<sup>5</sup> Moreover, Legislative Intent must be considered in “interpreting” the statute.<sup>6</sup> In this regard, the exception to state preemption addresses preventing violence. There is not even a pretense that KCC 10.25 was written or conceived for this purpose.

The vague and generalized “Whereas” statements in the ordinance are not competent evidence to qualify for an exception to the preemption rule. The trial court ignored the fact that the Club’s operations at the time the Ordinance was adopted were definitively safe and had not resulted in any harm to people, property or animals. In fact, the County contradicts itself because it found in Kitsap County Resolution 87-2009<sup>7</sup> that it was in “the public interest for firearm safety” to allow KRRC to continue to operate with “full control” over the property on which it is located.

CP 194.

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<sup>5</sup> KCC Chapter 10.25 requires all current and future shooting ranges in the County to apply for a permit to operate. The indiscriminate county wide and “futuristic” application of KCC 10.25 shows that it does not qualify for an exemption to preemption of firearms regulations.

<sup>6</sup> It is the immediate purpose of chapter 7, Laws of 1994 sp. sess. to: (1) Prevent acts of violence by encouraging change in social norms and individual behaviors that have been shown to increase the risk of violence; (2) reduce the rate of at-risk children and youth, as defined in \*RCW 70.190.010; (3) increase the severity and certainty of punishment for youth and adults who commit violent acts; (4) reduce the severity of harm to individuals when violence occurs; (5) empower communities to focus their concerns and allow them to control the funds dedicated to empirically supported preventive efforts in their region; and (6) reduce the fiscal and social impact of violence on our society.”

<sup>7</sup> See **Appendix A-2**.

To fill the legislative gap in the Ordinance, the superior court looked to the findings of a different trial court, in a different jurisdiction, at a different time, in an unrelated case to “make up” the deficiencies. Judicial assumptions are not a substitute for local legislative findings, particularly where the court ruled that the unrelated case did not qualify to bar the then-current proceedings under the doctrine of “*res judicata*.”

KCC Chapter 10.25 is void on its face. The Ordinance subjects protected fundamental rights to the political whim and policy preferences of the County Council and the subjective discretion of the Department of Planning and Community Development. CP 190..

## **II. ASSIGNMENTS OF ERROR**

**Error No. 1:** The trial court is in error by holding that “Nothing in KCC 10.25 directly regulates the ... possession...or discharge of firearms.” CP 115

**Error No. 2:** The trial court is in error by holding that KCC 10.25 falls within the exemption to state preemption, RCW 9.41.300(2), considering the finding in Kitsap County Resolution No. 87-2009 (May 11, 2009) that “it is in the public interest for firearm safety as well as in the best economic interest of the County to provide that KRRC continue to operate with full control over the property on which it is

located” CP 194 and the Legislative Intent to “prevent violence,” via the exemption to State Preemption, of which there is no evidence in this case.

**Error No. 3:** The trial court is in error by incorporating findings from an unrelated case involving the Club into the challenged ordinance, imparting such findings as “legislative findings” in order to find that KCC 10.25 falls within the exemption to RCW 9.41.290.

**Error No. 4:** The trial court is in error by presuming to adopt legislative findings as part of the County’s ordinance adoption process, without independent judicial review, contrary to the Separation of Powers.

**Error No. 5:** The trial court is in error in failing to construe KCC 10.25 as grandfathering the KRRC’s existing uses and activities, as reasonably intensified through the years.

**Error No. 6:** The trial court is in error by failing to rule that KCC 10.25 improperly infringes upon the Club’s 2<sup>nd</sup> Amendment Rights pursuant to the United States Constitution and/or Washington State Constitution, Article 1 § 24.

**Error No. 7:** The trial court is in error by failing to rule that is it a denial of federal and state substantive and procedural due process protections to adopt alleged findings from another case without providing the Club the opportunity to meet and challenge the findings as part of the adoption process for KCC 10.25.

**Error No. 8:** The trial court's finding that the KRRC is open to the public for certain instructional classes (CP 115, page 3:12-13) is contrary to evidence in the record that the KRRC is open to the public regardless of classes.

**Error No. 9:** The trial court's finding that the Court of Appeals already made a final determination as to the intent of the Deed conveying the land to KRRC is in error. CP 115, page 6:12-14)

**Error No. 10:** The trial court erred in failing to rule that KCC 10.25 is Unconstitutionally Vague and Violates the Club's Due Process Rights Under the Washington State Constitution Article 1 § 3 and the 14<sup>th</sup> Amendment to the United States Constitution.

**Error No. 11:** KCC 10.25 is overbroad, as it restricts non-firearm regulation at the Club, including, but not limited to gun classes on maintenance and cleaning, and the lower court erred in failing to so rule.

**Error No. 12:** The trial court erred in failing to hold a Bargain and Sale Deed<sup>8</sup> with covenants (and related Resolution) acted to approve the Club's activities and exempt it from the County's new regulations embodied in KCC Chapter 10.25.

**Error No. 13:** The trial court erred in granting summary judgment in favor of Kitsap County and upholding the challenged Ordinance.

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<sup>8</sup> The Deed is found at **Appendix A-3**.



### **III. ISSUES RELATED TO ASSIGNMENTS OF ERROR**

(1) Did the trial court err in granting summary judgment in favor of Kitsap County by impermissibly finding: (a) no direct regulation of the discharge of firearms; (b) incorporating findings from an unrelated case; (c) filling in the factual gaps in order to support the challenged regulation; (d) finding the Club's facility is open to the general public only for certain instructional classes; and/or (f) ruling the effect of a Bargain and Sale Deed has been decided by another court? (Assignments of Error Nos. 1, 3-4, 7-9, 11)

(2) Did the trial court err in granting summary judgment in favor of Kitsap County by holding the challenged law, KCC 10.25, was not preempted by general state law, RCW Chapter 9.41? (Assignments of Error Nos. 2, 13)

(3) Did the trial court err in granting summary judgment in favor of Kitsap County when failing to consider and/or hold that the Club's grandfathered status and/or Bargain and Sale Deed covenants exempted it from KCC Chapter 10.25? (Assignment of Error Nos. 5, 12)

(4) Did the trial court err in granting summary judgment in favor of Kitsap County by holding KCC 10.25 does not violate Second Amendment rights and is not unconstitutionally vague? (Assignment of Error Nos. 6-10 and 13)

(5) Did the trial court err in upholding the validity of KCC Chapter 10.25? (Assignment of Error Nos. 2, 6, 10, 11, 13)

#### **IV. STATEMENT OF THE CASE**

In 1983, the state of Washington enacted RCW Chapter 9.41 to prevent municipalities from adopting inconsistent laws and ordinances concerning the regulation of firearms. Chapter 9.41 has been amended several times, in 1985 and 1994. Each amendment has reinforced and removed any doubt that “The state of Washington fully occupies and preempt the entire field of firearms regulation within the boundaries of the state, . . . .” RCW 9.41.290. As amended in 1994, “Cities, towns, and counties or other municipalities may enact only those laws and ordinances relating to firearms that are specifically authorized by state law, as in RCW 9.41.300, and are consistent with this chapter. . . .” RCW 9.41.290.

In 2011, Kitsap County began the process of formulating a county wide ordinance regulating the discharge of firearms and shooting ranges in Kitsap County. CP 132 In 2013, and without any proof that the operation of any shooting range or shooting ranges in general in Kitsap County, and in particular the Club’s shooting range, posed a reasonable likelihood of harm to humans, domestic animals or property as required by RCW 9.41.300(2), the County adopted local ordinance KCC 10.25, *Discharge of Firearms*. KCC 10.25 regulates all aspects of the discharge of firearms

and the operations of shooting ranges open to the public in the County. The important backdrop is the finding in Kitsap County Resolution No. 087-2009, which confirms its determination of the safety of KRRC's operations at the current location of the facility.

KCC 10.25 was adopted on September 22, 2014 and became effective on December 22, 2014. CP 132. As noted, the Club did not initially apply for a permit per KCC 10.25. The County filed a complaint for a Declaratory Judgment pursuant to RCW 7.24.020 alleging that KCC 10.25 is a valid ordinance applicable and enforceable against the Club. CP 8.

On April 2, 2015, the County filed a Motion for Preliminary Injunction seeking to enjoin shooting operations and discharging firearms until such time the Club submits an application per KCC 10.25. CP 32-33.

On April 24, 2015, the trial court entered an Order Granting Preliminary Injunction,<sup>9</sup> which Order prevented the Club from discharging firearms until the Club completes an application per KCC 10.25. CP 135.

The Club submitted, under protest and reserving all rights, its application for the permit per KCC 10.25 and on April 7, 2016, the trial court entered an Order on Defendant's Motion to Dissolve Preliminary Injunction as a result of the Club's filing for a permit per KCC 10.25.

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<sup>9</sup> See **Appendix A-4**.

On May 5, 2015, the County filed a Motion for Summary Judgment regarding applicability of KCC 10.25 as against the Club, requiring the Club to apply for a permit to continue operations of its shooting range and facilities. CP 140-153 The Club opposed the County's Motion arguing that KCC 10.25 was preempted by RCW 9.41.290, that the County did not prove or qualify for an exemption to state preemption pursuant to RCW 9.41.300(2) and that KCC 10.25 impermissibly infringes on the 2<sup>nd</sup> Amendment to the United States Constitution and Article I of the Washington State Constitution. CP 154-182; 469-502; and 516-602

On May 16, 2016, the trial Court issued a Memorandum Opinion and Order.<sup>10</sup> The trial court found that KCC 10.25, *Firearms Discharge*, does not directly regulate the discharge of firearms. It ruled that any infringement on 2<sup>nd</sup> Amendment Rights is minimal. The court excused the County's lack of competent evidence to establish any right to attempt to regulate firearm discharge under the limited exception to preemption, going so far as to "incorporate" findings into the challenged ordinance by judicial fiat by adopting findings from a separate case. CP 609. The Order ruled that KCC 10.25 is enforceable against the Club's shooting range and the Club is required to secure an operating permit.

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<sup>10</sup> See **Appendix A-5**.

**V. ARGUMENT FOR REVERSAL OF ORDER ON SUMMARY JUDGMENT AND INVALIDATION OF ORDINANCE.**

This is case of first impression as to what, if any, evidence is required to sustain local regulation of firearms and shooting activities under the qualified exception of RCW 9.41.300(2). The Club argues that if this Court allows upholds the validity of KCC 10.25 it will set precedent allowing any local jurisdiction to adopt sweeping firearms regulations without regard to Washington State preemption of firearm regulation or the narrowly tailored exception. The key issue before the Court is:

***Whether the question of whether there is a “reasonable likelihood of harm to people, property or animals” as a precondition of an adoption of a local firearms regulation, requires a level of proof greater than that required to justify ordinary “health, safety and welfare” regulations.***

**A. Standard of Review**

This Court reviews the summary judgment *de novo*. See *Folsom v. Burger King*, 135 Wn.2d 658 (1998). “In analyzing orders on summary judgment, this court has traditionally noted that a moving party under CR 56 bears the initial burden of demonstrating an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law.” *Schaaf v. Highfield*, 127 Wn.2d 17, 21 (1995). A court “must consider the facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party.” *Wilson v. Steinbach*, 98 Wn.2d

434, 437 (1982). “The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.” *Id.*

The Court also determines *de novo* the legal effect of the evidence, *Lilly v. Lynch*, 88 Wn. App. 306, 316 (1997). Thus, this Court decides anew whether the evidence and inferences in the Appellant’s favor support the elements their claims. In applying these standards favorable to the Appellant, this Court should reverse.

**B. The Finding that KCC 10.25, *Firearm Discharge*, Does Not Regulate the Discharge of Firearms is Directly Contradicted by the Ordinance, the County’s Contemporaneous Interpretation of the Ordinance and the Orders Issued by the Trial Court.**

In its May 16, 2016 Order, the trial court held: “Nothing in KCC 10.25 directly regulates the registration, licensing, possession, purchase, sale, acquisition, transfer, discharge or transportation of firearms.” (CP 15) The plain language and enforcement provisions of KCC 10.25 as well as the issuance of an injunction of the trial court prohibiting the discharge of firearms, contradict the trial court holding.

That KCC 10.25 regulates of the use of firearms, including but not limited to shooting or the discharge of firearms, could not be more direct. KCC 10.25 is titled “*Firearms Discharge*” in the County Code. (CP 133; 47) KCC 10.25.070 states: “Definitions . . . (22) “Shooting range” or “range” means a place set aside and designated for the safe discharge of

**firearms** for individuals wishing to practice, improve upon or compete as to their shooting skills. . . .” (emphasis added). (CP 55)

In the Declaration of Larry Keeton, the then Director of Kitsap County Department of Community Development (“DCD”) dated March 31, 2015, Exhibit C thereto (CP 68), he attached a letter he wrote to Mr. Carter as the Executive Director of the Club. The first paragraph specifically references KCC 10.25, *Firearms Discharge*. He confirms that the Code is a public safety ordinance designed to ensure shooting facilities maintain positive control of bullets on their range.

In the Order Granting Preliminary Injunction, Findings of Fact and Conclusions of Law, page 4, paragraph 3, the Court found that the KRRC operates as a shooting facility and issued an injunction preventing the ***discharge*** of firearms on its property without having obtained an operating permit as required by KCC 10.25. (Emphasis added). (CP 133) The injunction did not terminate other ancillary functions of the Club.

In Kitsap County’s Response to KRRC’s Notice of Supplemental Authority, counsel for Kitsap County admitted, “Chapter 10.25 ***regulates the circumstances under which a firearm may be discharged*** on a recreational shooting facility.” CP 514 (emphasis added).

The Preliminary Injunction entered on April 24, 2015 ordered: “4. Pending trial, KRRC shall prevent any and all persons and entities

from *discharging firearms* upon the Property or at the shooting facility thereupon.” (Emphasis added) CP 22.

Assuming arguendo, the regulation of the discharge of firearms is *indirect*, it nonetheless is a regulation. The Legislature’s intent for the state to occupy the entire field of firearm regulation does not differentiate between a direct or indirect regulation thereof. All local firearm regulations are preempted by the statute. A virtually absolute right is subject to protection without regard to the extent of intrusion.

With fullest respect, it is understandingly tempting to want to do more out of concern for possible impacts. But this approach illustrates the counter-majoritarian difficulty: “which is to be master,” the legislature or the court? Lewis Carroll, *THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE*, 124 (1871) (William Morrow & Co.1993). When a statute such as RCW 9.41.290-.300 is unambiguous, and without question within the power of the legislature to enact, the answer is clear. The court cannot substitute its preferences for those of the legislature

**C. The Trial Court was in Error by Failing to Construe KCC 10.25 as Exempting KRRC’s Activities.**

Prior to executing the Bargain and Sale Deed, the County adopted Resolution 087-2009 in which it expressly found that KRRC’s operations of the range at this location is “in the public interest for firearm safety.”



The Bargain and Sale Deed, and State of Washington rules and regulations for the operation of a shooting range, including but not limited to the terms of the Bargain and Sale Deed, render KCC 10.25 invalid and unenforceable against the Club because its use is has been confirmed as a legal non-confirming use subject to the specific safety criteria.

Alternatively, the Deed is properly construed as an entitlement.

In 1993, the Chairman of the Kitsap County Board of Commissioners notified the Club and three other shooting ranges located in Kitsap County that the County considered each to be lawfully established, nonconforming uses. This notice was prompted by the shooting ranges' concern over a proposed new ordinance limiting the location of shooting ranges. (Ordinance 50-B-1993). The County has conceded that as of 1993 the Club's use of the property as a shooting range constituted a lawful nonconforming use.

The doctrine of nonconforming use is founded on fairness and due process concerns. *King County Department of Development and Environmental Services v. King County*, 177 Wn.2d 636, 305 P.3d 240 (2013). The County's attempt to require an operating permit for the firing range that has been in use for over 90 years is an impermissible denial of due process rights associated with grandfathered uses. *See, e.g. Land v. Village of Wesley Chapel*, 697 S.E.2d 458 (N. C. App. 2010) (ruling that

the lack of a special use permit to operate a private firing range did not render the use as “not nonconforming”).<sup>11</sup>

The Deed is properly construed as an equitable servitude. This type of land interest is a covenant that sets an owner’s expectations by placing certain burdens and benefits on the future use of the land. *Riverview Cmty. Grp. v. Spencer & Livingston*, 181 Wn.2d 888, 897, 337 P.3d 1076 (2014). The burdens on the property owner benefit the County here, as it locked in conditions of approval on the entire property, which run with the land. The residential development conditions were part of the “bundle of sticks” that the Club thought it was receiving when it accepted the Deed. *Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*, 120 Wn. App. 246, 253, 84 P.3d 295 (2004). *See also Crisp v. Vanlaeken*, 130 Wn. App. 320, 323, 122 P.3d 296 (2005) (An equitable servitude is a property interest.); *Crescent Harbor Water Co. v. Lyseng*, 51 Wn. App. 337, 339, fn.3, 753 P.2d 555 (1988) (An equitable servitude is a use interest. *See also* Stephen Phillabaum, ENFORCEABILITY OF LAND USE SERVITUDES BENEFITING LOCAL GOVERNMENT IN WASHINGTON, 3 Univ. Puget Sound L. Rev. 216, 216-18 (1979) (Government-imposed conditions are land-use planning

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<sup>11</sup> In *Wesley Chapel*, at the time the Plaintiff purchased his property and began using it for a private firing range, it was in an unincorporated area there were no restrictions in the zoning code for such use. Subsequently, the property was annexed by the Village and rezoned to residential use. The Court rejected the argument that the 1998 County Ordinance required a special use permit, discussing the fact that the common law principle of the “free use of property” is the antithesis of the 1988 Ordinance at issue in that case.

tools that create reciprocal benefits/and burdens on both the landowner and public).<sup>12</sup>

The benefit to KRRC is found in the covenant to manage its facility as a private alternative to zoning or other regulation such as special permit approval. *Lake Limerick Country Club* at 253. In return, the covenants indemnify the County, place an insurance burden on the Club (Condition No. 2), and set management practices (Condition No. 3), safety performance standards (Condition No. 4) and environmental protection requirements (Condition Nos. 7-8).

**D. KCC 10.25 is Preempted by the General Laws of the State of Washington and is Therefore Void and Unenforceable. The Qualified Exemption to RCW Chapter 9.41 Does Not Apply.**

KCC 10.25 conflicts with a general law of the state, RCW Chapter 9.41, governing Firearms and Dangerous Weapons because the local law seeks to protect the “general public” but the Legislature’s limited exception is applicable only where there is a “reasonable likelihood” of actual harm resulting from the discharge of firearms. No less than 12 standards for shooting facilities are required to be met before the County

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<sup>12</sup> To establish an equitable servitude by estoppel, a property owner must show: (1) an express or implied representation made under circumstances where (2) it is reasonably foreseeable that the person to whom the representation is made will rely on it; (3) that the person relies on the representation; (4) that such reliance is reasonable; and (5) that establishing a servitude is necessary to avoid injustice. *Mountain High Homeowners Ass’n v. J.L. Ward Co.*, 228 Or. App. 424, 438, 209 P.3d 347 (2009) (cited favorably by *Riverview Cmty.*, 181 Wn.2d at 898-99); see also Restatement (Third) of Property: Servitudes § 2.10 (2000).

will issue a permit. KCC 10.25.090(4). These regulate, among other things, alleged “noise impacts,” qualifications of engineers and professional consultants, the requirement of “qualified safety officers,” and limitation of shooting matches/competitions. KCC 10.25 also requires a “lead management program plan.” KCC 10.25.110; *see also* KCC 10.25.140 (stating “the department may require additional noise, environmental or safety controls as a condition of continuing a shooting facility operating permit”).

RCW 9.41.290 provides for State preemption of *the entire field of firearms regulation* within the boundaries of the state, including the registration, licensing, possession, purchase, sale, acquisition, transfer, discharge, and transportation of firearms, or any other element relating to firearms or parts thereof, including ammunition and re-loader components, and further states that “[l]ocal laws and ordinances that are inconsistent with, more restrictive than, or exceed the requirements of state law shall not be enacted and are preempted and repealed, regardless of the nature of the code, charter, or home rule status of such city, town, county, or municipality.” (Emphasis added).

1. Statutory construction and requirements.

The limited exception to the State of Washington’s preemption of the entire field of firearm regulations is provided by RCW 9.41.300(2).

“[W]here a statute provides for a stated exception, no other exceptions will be assumed by implication.” *In re Eaton*, 110 Wash.2d 892, 898, 757 P.2d 961 (1988); *State v. Roadhs*, 71 Wash.2d 705, 707, 430 P.2d 586 (1967); *State v. Knight*, 79 Wn.App. 670, 680, 904 P.2d 1159 (1995).

The exception sets forth in plain and unambiguous language the findings that must be made by a local government before it may enact an ordinance regulating the discharge of firearms. It is well established under Washington law that: “We narrowly construe exceptions to statutory provisions. Narrow construction ensures that we give effect to the legislative intent underlying the general provisions. Narrow judicial construction means we will choose, when a choice is available, a restrictive interpretation over a broad, more liberal interpretation.” *See, e.g., Pac. Nw. Annual Conference of United Methodist Church v. Walla Walla County*, 82 Wash.2d 138, 141, 508 P.2d 1361 (1973).

It is true that Washington courts presume the validity of ordinances. *Palermo at Lakeland, LLC v. City of Bonney Lake*, 147 Wn. App. 64, 193 P.3d 168 (2008). But when a law or ordinance involves the regulation of a fundamental constitutional right, as here, the presumption is reversed. *See Weden v. San Juan County*, 135 Wash. 2d 678, 689, 958 P.2d 273 (1998) (If a “statute involves a fundamental right or a suspect class. . . the presumption is reversed”). The regulation of firearms and the

use of firearms involve fundamental Constitutional Rights under the 2<sup>nd</sup> Amendment. The County has the burden of proof that it has met the statutory requirements of RCW 9.41.300(2) to overcome state preemption and that it is authorized to regulate firearms and the discharge of firearms consistent with state law and constitutional protections. *Weden, supra*; *Hall, supra*, 80 Wash.2d at 801-02 (Burden of proof of facts essential to invocation of a statutory exception is on the proponent.)

Kitsap County argued that KCC 10.25 was adopted through its police powers for the generalized goal of public safety. The “plenary police power” in regulatory matters accorded to municipalities by WASH. CONST. Art. 11 § 11, however, ceases when the State enacts a general law upon the particular subject, unless there is room for concurrent jurisdiction. *City of Spokane v. Portch*, 92 Wash.2d 342, 346, 596 P. 2d 1044 (1979).

KCC 10.25 can only be adopted in accordance with the limited exceptions per RCW 9.41.300(2), not via plenary police power. The required narrow reading of the grounds allowing for the statutory preemption exemption for local regulation of shooting activities, and the fact that KCC 10.25 fails to allege or establish that one, or all, of the Kitsap shooting range operations present a “reasonable likelihood that humans, domestic animals, or property will be jeopardized,” requires this Court to reverse the decision of the trial court and declare as a matter of law that

KCC 10.25 is void. The County has made no showing that KCC 10.25 is necessary to prevent violence. Indeed, the County determined in 2009 that KRRC's operations at its current location "is in the public interest for firearm safety." Res. 87-2009. CP 194 The County has not shown any changes of circumstances since adopting this Resolution, or considered the Deed's covenant for the Club to operate its facility "...at all times in a safe and prudent manner and conform its activities to accepted industry standards and practices." (Deed, Covenant No. 5).

The County argued that KCC 10.25 is not preempted by RCW 9.41.290 because the Ordinance does not impose a penal penalty. Kitsap County is arguing for an exception to state preemption of all firearms regulations in the State of Washington when no such exception exists in any provision of RCW Chapter 9.41. The Court must reject such assertion.

2. There is no credible evidence directly associated with the passage of KCC 10.25 to show that it was adopted in response to a reasonable likelihood of harm to people, animals or property through the shooting range operations in Kitsap County.

KCC 10.25 is premised upon vague and generalized goals of safe shooting and public safety, now or in the future. But KCC 10.25 fails to identify any particularized harm or danger, or that the Ordinance is necessary to "prevent violence". Generalized goals are an invalid substitute for the necessary statutory elements required by RCW

9.41.300(2), of a “reasonable likelihood that humans, domestic animals, or property will be jeopardized....” which is a prerequisite for the authority for any local jurisdiction to regulate firearms. Mere speculation cannot sustain a finding. *See Johnson v. Aluminum Precision Prods., Inc.*, 135 Wn. App. 204, 208-09, 143 P.3d 876 (2006).

A party claiming an exception to a rule – here, the County – bears the burden of demonstrating that the claimed exception applies. *Isla Verde International Holdings v. City of Camas*, 146 Wash.2d 740, 49 P.3d 867 (2002); *Hall*, 80 Wash.2d at 801-02. Generalized statements and “[b]lanket inferences of this kind substitute generalities for the required showing of reasonably specific ‘underlying circumstances,’ and fail to satisfy the County’s burden of proof.” *See State v. Thein*, 138 Wash.2d 133, 147, 977 P.2d 582 (1999). A finding of fact made without evidence in the record to support it, and an order based upon such finding, is arbitrary. *State ex rel. Tidewater-Shaver Barge Lines v. Kuykendall*, 42 Wash.2d 885, 891, 259 P.2d 838 (1953).

The instant matter is similar to *Chan v. City of Seattle*, 164 Wn. App. 549, 265 P.3d 169 (2011). There, the City of Seattle enacted a rule prohibiting the possession of firearms in designated city parks and park facilities. The policy reason for the rule was that “children and youth are



likely to be present.” *Chan, supra*, at 173.<sup>13</sup> The Court ruled RCW 9.41.290 preempts firearm regulations except as expressly authorized, and that the generalized reasons for the City rule on firearms did not meet the requirements for an exemption per RCW 9.41.300.

Because KCC 10.25 is county-wide, in order to overcome the preemption under Washington law regarding firearm regulations, Kitsap County was required to prove a reasonable likelihood of harm to people, animals or property throughout the County. KCC 10.25 does not include any such findings. KCC 10.25 also applies to possible future shooting ranges. It is of course, impossible for Kitsap County to know what, if any, “jeopardy” will be presented by a yet to be created shooting range.

The County has consistently failed to identify any real or potential harm, merely complaining about the failure of the Club to apply for a permit. The County claimed a right, pursuant to the holding in *San Juan County v. No New Gas Tax*, 160 Wash.2d 141, 152, 157 P.3d 831 (2007), to a preliminary injunction to prevent an invasion that has or will result in “actual and substantial injury.” CP 37. This bald allegation is insufficient to show “actual and substantial injury” for injunctive relief. *See Kucera v. State, Dept. of Transp*, 140 Wash.2d 200, 219, 995 P.2d 63 (2000) (“We

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<sup>13</sup> It should be noted that Seattle banned the carrying of firearms in the park pursuant to the idea that such guns in such a location could reasonably incite violence, such that it fell within the limited exception of RCW 9.41.300.

find it illogical to enjoin an action without first finding the action is the cause of the alleged ... harm and further finding in a factually specific way that the criteria for injunctive relief have been met”).

3. If the County establishes the right to an exception to the preemption statute, Kitsap County is limited to regulating the discharge of firearms and in particular locations.

KCC 10.25 far exceeds the limited exception for discharge of firearms regulations, provided by RCW 9.41.300(2). The authority of Kitsap County to regulate firearms pursuant to RCW 9.41.300(2) is limited to the ***discharge*** of firearms. The court in *City of Seattle v. Ballsmider*, 71 Wn.App. 159, 162-64, 856 P.2d 1113 (1993) discussed the enforceability of a Seattle ordinance regulating the discharge of firearms within the city limits. *Ballsmider* challenged the ordinance as preempted by RCW 9.41.290 and not within the limited exception of RCW 9.41.300(2)(a). The *Ballsmider* court held that RCW 9.41.300(2)(a) “merely give[s] local governments authority, without penalty or other restrictions, to enact laws regarding the ***discharge*** of firearms in areas where there is a reasonable likelihood that humans, domestic animals, or property will be jeopardized.” *Id.* at 164 (emphasis added). It ruled that the penalty imposed by the city ordinance in that case was not contrary to law *so long as the ordinance relates only to the discharge of firearms in the statutorily specified areas--i.e., areas where there is [an established]*

*reasonable likelihood of jeopardy to humans, domestic animals, or property. Id.* (emphasis added).

KCC 10.25 regulates the discharge of firearms, the shooting range hours of operation, building locations, types of events and number of shooting events, range design, without regard to the “reasonable likelihood” qualifier. Again, the County has not provided any legislative findings to support a finding that the preemption exception applies. *See Isla Verde, supra; Hall, supra.*

4. KCC 10.25 impermissibly regulates all shooting range operations and activities and is overbroad.

RCW 9.41.290 states in pertinent part: “Local laws and ordinances that are inconsistent with, more restrictive than, or exceed the requirements of state law shall not be enacted and are preempted and repealed, regardless of the nature of the code, charter, or home rule status of such city, town, county, or municipality.”

KCC 10.25.090(4)(1)(iv) regulates the hours of operation, contrary to RCW 9.41.290 and .300 ; limits calibers of firearms (KCC 10.25.090(4)(f)) exceeding the requirements of state law; limits shooting events or activities (KCC 10.25.090(4)(1)) thereby exceeding the requirements of state law; KCC 10.25.090(4) requires the application for an operating permit for a shooting range, which requirement exceeds the

state law; KCC 10.25.090(4) requires shooting range design standards, which standards exceed any requirement of state law. The list of requirements of KCC 10.25 exceeding state law is so exhaustive that it is simpler to point out that there are no provisions of KCC 10.25 that are “less than” or consistent with state law.

The Bargain and Sale Deed, by which the County deeded to the Club the land upon which it has operated for 90 plus years, sets forth under paragraph 3, that the activities of Club “shall conform to the rules and regulations of the Firearms Range Account, administered by the State Recreation and Conversation Office.” CP 197-198. The Firearms Range Account, established by the Washington legislature, to provide a safe and accessible area for shooting ranges and to promote public safety. CP 198. KCC 10.25 was not adopted to ensure the Club is a safe shooting facility or for the claimed need for public safety. (“Whether or not KRRC is safe is immaterial to whether it is required to comply with local shooting range regulations. . . . It does not apply only to ‘unsafe’ shooting ranges.”

Kitsap County’s Reply for Motion for Summary Judgment. CP 623.

**E. The Trial Court’s Finding that the KRRC is Open to the Public for Certain Instructional Classes (CP 115, p.3:12-13) is Contrary to Evidence in the Record that the KRRC is Open to the Public Regardless of Classes.**

Attached to the Declaration of Marcus Carter in Opposition to

Plaintiff's Motion for Summary Judgment, Exhibit "B" thereto, is a copy of the Bargain and Sale Deed by which Kitsap conveyed title to the real property upon which the Club has been operating for the preceding 90 plus years. The Bargain and Sale Deed specifically provides, paragraph 4, for access to "b) members of the general public with concealed pistol or hunting licenses; and c) those enrolled in firearm or hunter safety education classes. Access by the public shall be offered at reasonable prices and on a nondiscriminatory basis." CP 198. In Resolution 087-2009, the County found "it is in the public interest for firearm safety" to allow KRRC to continue its operations at its current location.

The trial court record is devoid of any testimony that would support a claimed limitation in public access. "In Washington, findings of fact supported by substantial evidence will not be disturbed on appeal. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wash.2d 570, 575, 343 P.2d 183 (1959). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *In re Snyder*, 85 Wash.2d 182, 185-86, 532 P.2d 278 (1975); *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986).

The record does not support the finding of the Club being open to the public for limited purposes. This is relevant to claims of preemption per RCW 9.41.290 and Constitutional rights to keep and bear arms.

**F. The Trial Court’s Finding that the Court of Appeals Already Made a Final Determination as to the Intent of the Deed Conveying the Land to KRRC is in Error (CP 115, p.6:12-14).**

*Res judicata* does not apply to the Bargain and Sale Deed in this case because of the different legal and factual issues in each case, and the fact that KCC 10.25 was not an adopted ordinance at the time of the Pierce County ruling. The enforcement of KCC 10.25, as a new regulation of the Club’s shooting operations, contradicts the standards for range operation, per the Bargain and Sale Deed. The County cannot both convey real property with restrictive covenants, which include reference to shooting range operations, and subsequently adoption new shooting range regulations which regulations modify or change the restrictive covenants.

**G. The Trial Court Erred When it Incorporated Findings From Another Case that was “Factually And Legally Separate” and “Distinguishable” (CP 135) to Establish the Necessary Legislative Findings for KCC 10.25 to Qualify as an Exemption as Required by RCW 9.41.300(2).**

In its May 31, 2016 Order, the trial court held: “And even if KCC 10.25 did directly regulate the discharge of firearms, the *[sic]* RCW 9.41.300(2) exception applies.” (CP 609) “The trial court’s findings in *Kitsap Rifle [Kitsap County v. Kitsap Rifle and Revolver Club]*, Pierce County Cause No. 10-2-12913-3] shows there was a reasonable likelihood

that humans, domestic animals, or property were jeopardized then the ordinance was put into place.” CP 610.<sup>14</sup>

The referenced finding was made in another court, in a separate and distinguishable case that is so dissimilar to the current matter that the trial court earlier ruled in this case that the litigation in Kitsap County was not precluded by *res judicata*.

On the last point, the trial court specifically ruled on April 17, 2015: “The plaintiff’s claim is not barred by *res judicata* because the cause of action and subject matter under which this case arose is factually and legally separate and distinct from the claims litigated and decided in the case cited by Defense.” (CP 131) “Although in this lawsuit and in *Kitsap Rifle* the parties are identical, the quality of persons are the same, and the *Kitsap Rifle* lawsuit ended with a judgment on the merits, nevertheless ***the subject matter and cause of action giving rise to the claims of these two lawsuit arise under very distinguishable sets of facts.*** CP 135 (emphasis added). “Thus, both the factual and legal grounds under which injunctive relief is being sought here are distinguishable from the *Kitsap Rifle* case.” CP 135-36.

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<sup>14</sup> See *Kitsap Rifle No. 1*, 184 Wn.App. at 283, Memorandum Opinion, p.8. The Findings relate to o overhead baffles (with no reference to the existing berms), the “possible” striking of persons or property, and inadequate protocols. The protocols have been updated.

KCC 10.25 lacks specificity as to any reasonable likelihood of harm and is a generalized finding unrelated to the shooting operations of the Club at the time KCC 10.25 was adopted. It ignores the continued operation of the Club under the rulings in *Kitsap Rifle* with certain restrictions put into place following that court's order.

1. Issue Preclusion bars the inclusion of Findings from another case to attempt to prove a "reasonable likelihood that humans, domestic animals, or property will be jeopardized" as required by RCW 9.41.300(2).

In April 2015, Kitsap County filed a Motion for Preliminary Injunction to prevent the discharge of firearms on the Club property. CP 32-42. In response, the Club argued, among other things, that the claims of the County are barred by *Res Judicata*. The County argued, "The Pierce County matter [that involved the Club and Kitsap County] has nothing to do with the operating permit requirements required under Kitsap County's KCC 10.25, which is a public health and safety regulation." CP 99. This finding precludes the County and the Court from adopting findings from a different case to support its claims/ruling CP 131, 135-136.

The foregoing referenced findings by the trial court have not been appealed, are uncontested, and are verities in this appeal. *E.g., Schneider v. Snyder's Foods, Inc.*, 116 Wn. App. 706, 715, 66 P.3d 640 (2003). This Court is bound to base its decision on the fact that findings in *Kitsap Rifle*



are factually and legally distinguishable and cannot be the basis for the County's claimed exemption to state preemption per RCW 9.41.300(2).

2. The Declaratory Judgments Act does not allow the Court to supplement or add Finding to support the validity of KCC 10.25.

Ruling on the County's Motion for Declaratory Judgment, the trial court found: "The trial court's findings in *Kitsap Rifle* . . . show there was a reasonable likelihood humans, domestic animals, or property were jeopardized when the ordinance was put in place." CP 115. No evidence was presented, only argument of counsel,<sup>15</sup> that findings in *Kitsap Rifle* were considered in the adoption process for KCC 10.25. It was an error for the court to supplement/create findings to support KCC 10.25, without evidence. *Tidewater-Shaver Barge Lines, supra*, at 891 (finding made without evidence and an order based upon such finding is arbitrary).

RCW 7.24.090 provides in a declaratory judgment act that facts may be tried and determined "... in the same manner as issues of fact are tried and determined in other civil actions ...."

If the validity of an ordinance has been challenged by a declaratory judgment action, the court has the responsibility of determining the validity of the statute or ordinance, "at least in so far as the validity or invalidity is

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<sup>15</sup> Arguments of counsel do not constitute evidence. *E.g., State v. Gibson*, 75 Wash.2d 174, 177, 449 P.2d 692 (1969).

apparent and obvious in the wording of the act” (citations omitted). *City of Yakima v. Huza*, 67 Wash.2d 351, 360 407 P.2d 815 (1965).

There is no authority in the state of Washington, or in reported federal decisions, that allows a court to “create,” or “supplant” or “infer” supporting legislative findings for an ordinance. *See Miller v Tacoma*, 61 Wn. 2d 351, 382, 378 P.2d 464 (1963) (ruling that, to carry out the purposes of a renewal blight law, “some form of inspection must be made as a basis of factual determination”). This was not done.

3. Findings in *Kitsap Rifle* may not be presumed to be a part of KCC 10.25.

For KCC 10.25 to survive preemption under RCW 9.41.300(2) the Ordinance must be based upon a reasonable likelihood human, domestic animals, or property are jeopardized. RCW 9.41.300(2). The necessary finding(s) are not included in the wording of KCC 10.25.

Kitsap County did not establish that a prior finding made by a different court, on a different claim and in a different case, with different facts, unspecified as to the exact and particular shooting activity and the a lack of finding a reasonable likelihood of harm to people, property or animals, meets the necessary requirements of RCW 9.41.300(2).

Argument of counsel is not evidence. *Gibson, supra*, 75 Wash.2d at 177. Moreover, “[a] presumption is not evidence; its efficacy is lost while the

opposite party adduces prima facie evidence to the contrary.” *Bates v.*

*Bowles Whit & Co., Inc.* 56 Wash.2d 374, 353 P.2d 663 (1960).

**H. The Trial Court Violated the Separation of Powers  
Guaranteed by the Washington State Constitution Article 2 § 1  
by Presuming to Adopt Legislative Findings To Validate  
KCC 10.25.**

The Separation of Powers between the Executive, Legislative and Judicial branches of government is the bedrock of a healthy republic. The Washington State Constitution, Article 2 § 1 reserves unto the legislature the exclusive power to create laws.

Where the legislature, and in this case, the County Commissioners, created legislation failing to make certain and required findings, the Court is powerless to create or adopt findings to complete the legislation:

When faced with an emergency clause, the court must independently determine whether an emergency actually exists and whether the challenged statute actually addresses it. *State ex rel. Kennedy v. Reeves*, 22 Wash.2d 677, 679-81, 157 P.2d 721 (1945) (“Unless we can say that the act is, in fact, necessary for the immediate preservation of the public peace, or for the immediate preservation of the public health, or for the support of the state government and its existing public institutions, the relators are of right entitled to the writ prayed for.” *Id.* at 682, 157 P.2d 721.). This is the essence of judicial review which is the constitutional responsibility of this court. Const. Art. IV.

Courts cannot cure errors in legislation even if the legislature, by inadvertence, brought about the result described above. It is, under our constitution, purely a legislative problem. Const. Art. 2, § 1, provides:

“The legislative authority of the State of Washington shall be vested in the legislature \* \* \*.” *State ex rel. Hagan v. Chinook Hotel, Inc.*, 65 Wash.2d 573, 578. 399 P.2d 8 (1965).

“This court has many times held that it will not insert, in legislative acts, words which were seemingly unintentionally omitted, nor disregard any words which may appear to us to have been inadvertently included.” *Chinook Hotel, supra*, at 578. “The court cannot read into a statute anything which it may conceive that the legislature has unintentionally left out. *Seattle Ass’n of Credit Men v. General Motors Acceptance Corporation*, 188 Wash. 635, 63 P.2d 359; *Maryland Casualty Co. v. City of Tacoma*, 199 Wash. 384, 92 P.2d 203. *Chinook Hotel, supra*, at 579

The failure of Kitsap County, in its adoption of KCC 10.25 to specifically make findings establishing that there is reasonable likelihood of harm to people, property or animals renders the ordinance void per RCW 9.41.290. The judiciary, in attempting to act as the legislative arm of local government, cannot correct this failure.

**I. The Trial Court is in Error in Failing to Construe KCC 10.25 as Grandfathering the KRRC’s Existing Uses and Activities, with Reasonable Intensification through the Years.**

In the Memorandum Opinion and Order on Plaintiff’s Motion for Preliminary Injunction, the trial court correctly held that “Here, KRRC [the Club] was established as a nonconforming use, along with three other

shooting ranges located in Kitsap County, in response to an Ordinance passed in 1993. . . .” CP 139.

Title 17 of the *Kitsap County Code* (KCC 17.460.020) explicitly recognizes non-conforming or grandfathered rights:

Where a lawful use of land exists that is not allowed under current regulations, but was allowed when the use was initially established, that use may be continued so long as it remains otherwise lawful, and shall be deemed a non-conforming use.

The trial court rejected the Club’s non-conforming rights as against the exercise of the County’s police powers in adopting KCC 10.25. The trial court mistakenly relied on *Rhoda-A-Zalea & 35<sup>th</sup>, Inc. v. Snohomish County*, 136 Wn.2d 1, 959, P.2d 1024 (1988) concerning an exercise of police powers for health and safety reasons. *Rhoda-A-Zalea, supra*, did not involve a fundamental constitutional right, as in this case.

The Club challenged the County to demonstrate actual or substantial injury to support a temporary injunction and the enforcement of KCC 10.25 against the Club. CP 88. The only injury claimed by the County from the Club’s shooting range, was the failure to secure a permit per KCC 10.25, citing *King County ex. ex rel. Sowers v. Chisman*, 33 Wn.App 809, 818-19, 658 P2d 1256 (1983). No consideration was given to the Deed’s operational requirements.

Because KCC 10.25 involves the regulation of a fundamental constitutional right, the presumption of a valid police power regulation is reversed. *Weden, supra, at 689*. The County failed to prove real or likely harm from the Club's operation. The exercise of the County's police power, as against a constitutional right, is contingent upon proof a real or likely harm. *See id.* Lacking proof of real or likely harm, the County was without authority to enact, or enforce, KCC 10.25 as against the nonconforming or grandfathered rights of operation of the Club.

In the County's Reply for Motion for Summary Judgment, the County candidly acknowledged that KCC 10.25 is not a public safety ordinance, but rather an all-encompassing land use regulation. "Whether or not KRRC [Club] is safe is immaterial to whether it is required to comply with local shooting range regulations. The ordinance applies to **all** new and existing shooting ranges." CP 623.

KCC 10.25 is a comprehensive ordinance that regulates every aspect of the Club's facilities. Building size, location of plants, parking facilities, lights and locations, etc. are caught under the sweeping arm of the ordinance. The adoption of KCC 10.25 is a thinly disguised and ill-conceived attempt to make moot nonconforming or grandfathered rights. In this appeal, the County is challenged to point to the record, not with

generalities, but where and how building size, plant locations, the shooting operations of the Club are factors affecting public health and safety.

**J. Based Upon Strict or Heightened Scrutiny, KCC 10.25 is an Impermissible Infringement Upon the Club and its Members' 2<sup>nd</sup> Amendment Rights.**

KCC 10.25 is presumptively invalid requiring strict scrutiny to insure that the law is narrowly tailed to serve a compelling governmental interest. *See Ezell v. City of Chicago*. 651 F.3d 684, 706 (7<sup>th</sup> Cir. 2011). Yet, the trial court opinion took the improbable position that a government's desire to regulate a constitutionally protected activity is not an infringement on the constitutional protections. The Appellant's 2<sup>nd</sup> Amendment rights were ignored and the infringement upon those rights not addressed nor considered.

In footnote 8 to the Order on Plaintiff's Motion for Summary Judgment, (CP 607), the trial court acknowledged the Club's argument that KCC 10.25 unconstitutionally infringes on the Club's 2<sup>nd</sup> Amendment Rights. The court's opinion was that KCC 10.25 does not directly regulate firearms and that it only impacts in the "narrow circumstances of discharging firearms in the use of the shooting range facility." (CP 609, li 14-15) There is no such exception to the 2<sup>nd</sup> Amendment to the United States Constitution and Article I § 24 of the Washington Constitution to

support a ruling that constitutional protections are geographically limited and confined to those areas where the government does not seek control.

Gun ownership and use is an inexorable birthright of American tradition. “Americans who participated in the Revolution of 1776 and adopted the Bill of Rights held the individual right to have and use arms against tyranny to be fundamental.” Stephen P. Halbrook, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 55 (1984). Gun ownership was a universal legal duty of American colonists. Joyce Lee Malcolm, *THE RIGHT OF THE PEOPLE TO KEEP AND BEAR ARMS: THE COMMON LAW TRADITION*, 10 *Hastings Const. L.Q.* 285, 290-95 (1983).

Courts regard the history, lineage, and pedigree of the Second Amendment right to bear arms necessary to an Anglo-American regime of ordered liberty and fundamental to the American scheme of justice. It is deeply rooted in this Nation’s history and tradition. *Sieyes, supra*, 168 Wash.2d at 287. Further, Art. I, Section 24 of the Washington Constitution plainly guarantees an individual right to bear arms. *Id.* at .292. “[T]here is quite explicit language about the ‘right of the individual citizen to bear arms in defense of himself.’”<sup>16</sup> This means what it says.

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<sup>16</sup> KRRC does not assert that the constitutionally protected right to bear arms is “absolute,” and admits that it is subject to “reasonable regulation” by the State under very narrow circumstances to prevent violence. *Morris v. Blaker*, 118 Wash.2d 133, 144, 821 P.2d 482 (1992).



From time to time, people in the West had to use their weapons to defend themselves and were not interested in being disarmed.” Hugh Spitzer, BEARING ARMS IN WASHINGTON STATE (Proceedings of the Spring Conference, Washington State Association of Municipal Attorneys (Apr. 24, 1997)). As the *Sieyer* court ruled:

In Washington, the police power is subject to all the rights specified in our Declaration of Rights, including the constitutional right of the individual citizen to keep and bear arms. ***We are not at liberty to disregard this text:*** “The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.” Const. art. I, § 29. (Emphasis added).

The State’s legislative scheme pre-empts the field of firearms regulation, allowing local jurisdictions the right to further regulate ***only*** where there is a showing of reasonable jeopardy to safety ***and*** where the constitutional right to bear arms is not infringed. The County has failed to make these essential showings tied into the goal to prevent violence.

The most important fundamental constitutional issue before the court, which issue was ignored, was the improper infringement upon the 2<sup>nd</sup> Amendment rights of the Club and its members by the County’s enforcement of KCC 10.25. (CP 66) Article I § 24 of the Washington Constitution prohibits the government, without a well-defined and articulable rational, from impairing a citizen’s right to bear arms. *Sumner v. First Baptist Church of Sumner*, 97 Wash.2d 1, 639 P.2d 1358 (1982)

and *Open Door Baptist Church of Clark County*, 140 Wash.2d 143, 995, P.2d 33 (2000). “The right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn’t mean much without the training and practice that make it effective.” *Ezell* at 684. In Washington, with limited exceptions, pursuant to the 2<sup>nd</sup> Amendment to the United States Constitution and Art. I § 24 of the Washington Constitution, adults have the right to keep and bear firearms. This right includes the ability to engage in shooting sports and training.

In *Ezell, supra*, the plaintiffs challenged a City of Chicago ordinance which specified training required before a citizen could possess a firearm and imposed a blanket ban on shooting ranges open to the public in the City of Chicago. Reversing the Chicago ban as unconstitutional, and not unlike the facts in this case, the Seventh Circuit Court of Appeals held regarding the claimed rationale for the ordinance was that the “City’s claimed harm to the public interest is based entirely on speculation.” *Ezell, supra*, at 690. In that case, the trial court referred to the ordinance and its application as “minor” and “inconvenient” because citizens would have to travel farther to reach an authorized shooting facility. *Ezell, supra*, at 693. Almost the same finding was made by the trial court in this case, “[T]he law impacts the right to discharge firearms indirectly, and

only in the narrow circumstances of discharging firearms in the use of the shooting range facility.” (CP 115, p.7)

Per the holding in *Ezell*: “First, the threshold inquiry in some Second Amendment cases will be a “scope” questions: Is the restricted activity protected by the Second Amendment in the first place.” *Ezell, supra*, at 701. The ruling in *Ezell* applied to the operation of a shooting range, the same as in this case. If the government has infringed upon the Appellant’s 2<sup>nd</sup> Amendment right, it requires the court to evaluate the regulatory means the government has chosen and the public-benefits end it seeks to achieve. *Ezell, supra*, at 703. “When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary. *Ezell, supra* at 699 (citations omitted. )

Per *Ezell, supra*, at 708 a level of scrutiny between strict and intermediate is required when a law creates an elaborate permitting scheme such as dictating the number and types of firearms allowed in the home. In this case, we have an elaborate government permitting scheme dictating the types of firearms allowed to be discharged without any checks, balances or scrutiny as to the infringement upon the Club and its member’s fundamental constitutional rights

Because KCC 10.25 infringes upon 2<sup>nd</sup> Amendment right, heightened scrutiny by the Court is required of the ordinance. Kitsap

County had the burden of justifying the action under a heightened standard of judicial review. (*See Ezell, supra*, at 706) “Although the Supreme Court did not do so in either *Heller* or *McDonald*, **the Court *did* make it clear that the deferential rational-basis standard is out, and with it the presumption of constitutionality.** *Heller*, 554 U.S. at 628 n. 27, 128 S.Ct. 2783 (citing *United States v. Carolene Prods.*, 304 U.S. 144, 152 n. 4, 58 S.Ct. 778, 82 LEd. 1234 (1938)). This necessarily means that the City bears the burden of justifying its action under *some* heightened standard of judicial review.” *Ezell*, *supra*, at 706. Instead of requiring the County to meet its burden of justifying its actions, the trial court improperly shifted the burden to the Club to defend its constitutional rights under the 2<sup>nd</sup> Amendment to the United States Constitution. Comparing the application of 1<sup>st</sup> Amendment standards to infringement upon 2<sup>nd</sup> Amendment rights, the Court in *Ezell* stated: “In the First Amendment context, the government must supply actual, reliable evidence to justify restricting protected expression based on secondary public-safety effects. *Ezell, supra* at 709.

The lower court was required to engage in a detailed analysis of the rights, responsibilities and constitutional protections afforded KRRC as against the wholesale adoption of KCC 10.25, but failed to do so. KCC 10.25 is overbroad and improperly infringes on federal constitutional

rights and Article 1 § 24 of the Washington State Constitution. “This is a serious encroachment on the right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense.” *Ezell, supra*, 651 F.3d at 708-09.

Failing to address constitutional issues results in a failure to properly determine whether Kitsap County has a clear legal and equitable right to an injunction as required by *San Juan County v. No New Gas Tax, supra*. No competent and relevant evidence was submitted in this case of any danger from the operation of the Club shooting range; merely speculation, which is not evidence. Actual, supporting evidence is a pre-condition of the enactment of a local ordinance infringing upon a fundamental constitutional right to keep and bear arms.

KCC 10.25 gave lip service to this fundamental State and Federal Constitutional right in its preamble, but gutted the rights the County claims to have recognized as part of its overreaching firearms regulation.

**K. It is a Denial of Federal and State Substantive and Procedural Due Process Protections to Adopt Alleged Findings From Another Case Without Providing The Club the Opportunity to Meet and Challenge the Findings as Part of the Adoption Process for KCC 10.25.**

“The Fourteenth Amendment of the United States Constitution provides that no state shall “deprive any person of life, liberty, or property, without due process of law....” The Washington Constitution contains an

identical clause. Procedural due process in Washington requires a meaningful opportunity to be heard. *Olympic Forest Products, Inc., v. Chaussee Corp.*, 82 Wash.2d 418, 421, 511 P.2d 1002 (1973) (citing *Boddie v. Connecticut*, 401 U.S. 371, 377, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971)). The scope of due process involves a balancing of “the private interest to be protected, the risk of erroneous deprivation of that interest by governmental procedure, and the government’s interest in maintaining such a procedure.” *Krein v. Nordstrom*, 80 Wash.App. 306, 310, 908 P.2d 889 (1995) (citing *Soundgarden v. Eikenberry*, 123 Wash.2d 750, 768, 871 P.2d 1050 (1994)); *Carlstrom v. Hanline*, 98 Wn.App. 780, 789-790 990 P.2d 986 (2000).

The trial court also committed error by not undertaking a three-prong test as to whether KCC 10.25 violates KRRC’s substantive due process rights. “[T]his court has adopted a three-prong test to determine whether a regulation violates substantive due process. The court must determine “(1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the land owner.” (Citations omitted). *Christianson v. Snohomish Heath*, 133 Wash.2d 647, 661, 946 P.2d 768 (1997).

At no time during the proceedings leading to the adoption of KCC 10.25 is there any evidence that the finding of the Pierce County

lawsuit was relied upon as an exception to the State preemption of firearm regulations pursuant to RCW 9.41.300(2). The trial court's adoption of the Pierce County findings denies to the Club its Due Process Right to challenge or question the adopted findings prior to passage of KCC 10.25.

**L. KCC 10.25 is Unconstitutionally Vague and Violates the Club's Due Process Rights Under the Washington State Constitution Article 1 § 3 and the 14<sup>th</sup> Amendment to the United States Constitution.**

KCC 10.25 is unconstitutionally broad and overreaching in violation of the Washington State Constitution Article 1, § 3, on its face and as applied to KRRC. The Ordinance is vague, allowing for arbitrary and capricious enforcement in violation of the due process protections of the federal and Washington State Constitution. *See* Carter Decl., ¶ 28. An egregious example is the County's staff made change to the promulgated performance standard. KCC § 10.25.090 states:

(a) Each shooting range within a shooting facility shall be designed, constructed, operated and maintained to contain bullets, shot or other discharged projectiles within the facility property. A shooting facility shall use the NRA Range Source Book, or other engineered specifications that meet or exceed the standards established by the Source Book, as a minimum to develop and implement institutional and facility controls for the safe operation, improvement and construction of shooting ranges. Facilities should engineer and construct facilities to reduce sound impacts on neighboring communities to the maximum extent feasible.

The promulgated performance standard is a positive, not a negative, and is accomplished by compliance with the NRA Range Sourcebook or other engineered specifications. At a minimum, the facility must implement “institutional and facility controls for the safe operation, improvement and construction of shooting facilities.” The stated language contrasts with the “prove a negative” Staff-imposed standard that no projectile will ever leave the facility. *See* Carter Decl., ¶ 28.<sup>17</sup>

The due process clause of the 14<sup>th</sup> Amendment to the United States Constitution requires a statute to provide fair notice of the conduct it proscribes. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); *State v. Watson*, 160 Wash.2d 1, 6, 154 P.3d 909 (2007). A statute or ordinance is “vague” if it fails to provide fair notice, measured by common practice and understanding, of that conduct which is prohibited and if there are not proper standards for adjudication. *Blondheim v. State*, 84 Wash.2d 874, 878, 529 P.2d 1096 (1975). Under the 14<sup>th</sup> Amendment, a statute may be void for vagueness if it is framed in terms so vague that persons of common intelligence must guess at its meaning and differ as to

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<sup>17</sup>County Staff have no right or authority to add language to KCC 10.25 not approved or promulgated by the Board of County Commissioners. *See West Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 50, 720 P.2d 782, 785 (1986) (due process standards require the City to apply and enforce its laws as written without adding new criteria on a case-by-case basis); *Peter Schroeder Architects v. City of Bellevue*, 83 Wn.App. 188, 920 P.2d 1216 (1996), *rev. denied*, 131 Wn.2d 1011 (1997).



its application. *Myrick v. Pierce Cy. Comm'rs*, 102 Wash.2d 698, 707, 677 P.2d 140, 687 P.2d 1152 (1984).

Several components of KCC 10.25 allow for unbridled discretion of the Department of Community Development, which may lead to arbitrary and capricious enforcement. Other components lack specific standards and are so ambiguous such that persons of ordinary intelligence must guess at their meaning. For example, KCC 10.25.090(4)(c) states:

Designs and safety procedures shall be evaluated by an NRA Range Technical Team Advisor (RTTA) or by a professional engineer with experience in shooting facilities or other qualified professional consultant with experience and expertise in the evaluation and design of shooting ranges.

This “standard” does not set forth any criteria for evaluation of designs and safety procedures. An applicant has no notice of what will be reviewed, nor any assurance that the Department of Community Development is constrained in any way in its determination of whether this standard is met. Similarly, KCC 10.25.090(4)(i) states:

All shooting facilities shall provide a means for participants and spectators to readily contact emergency services such as fire or medical aid.

The phrase “readily contact” is undefined and ambiguous, allowing unbridled discretion in the hands of the Department. KCC 10.25.090(4)(j) broadly requires:

Firing lines, targets and target lines must be located so that the direction of fire is not toward any structure housing people [sic] or domestic animals located within five hundred yards of the point of discharge.

KRRC posits that the inclusion of "people or domestic animals" is quite literally a moving target that could be used to prohibit all firing lines, targets and target lines on the possibility that a person or domestic animal could position itself in the direction of fire at any time.

Moreover, KCC 10.25's ambiguity also stems from its statement that the regulation is not allowed to or intended to "take away" grandfathered rights of a range. However, the Club's operations have not changed such to impact its grandfathered rights. The County has muddied the waters, and one has no notice of whether KCC 10.25 means what it says.

## **VI. CONCLUSION**

For the reasons stated, the KRRC's appeal should be granted, the Ordinance invalidated, and this matter remanded for a calculation of fees and damages caused by the improvidently entered injunction.

DATED this    day of January, 2017.

DANIELSON LAW OFFICE

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**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am now, and have at all times material hereto been, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a witness herein. I further certify that on this 3<sup>rd</sup> day of January, 2017, I caused the document to which this certificate is attached to be delivered for filing as follows:

Clerk of Court  
Court of Appeals, Division II  
950 Broadway, Suite 300, MS TB-06  
Tacoma, WA 98402-4454  
**Via Court's JIS-Link Electronic Filing System**

The original will be maintained in the files of the Dennis D. Reynolds Law Office. I further certify that on this date, I caused a copy of the document to which this certificate is attached to be delivered to the following by e-mail:

Christine M. Palmer, WSBA #42560  
Laura F. Zippel, WSBA #47978  
Deputy Prosecuting Attorneys  
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614 Division Street, SM-35A  
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Declared under penalty of perjury under the laws of the State of Washington at Bainbridge Island, Washington this 3<sup>rd</sup> day of January, 2017.

\_\_\_\_\_  
Jon Brenner, Paralegal

KRRC – Opening Brief

# **APPENDIX A-1**

**ORDINANCE NO. 515 -2014**

**AN ORDINANCE AMENDING KITSAP COUNTY CODE CONCERNING  
SHOOTING RANGES**

**WHEREAS**, Kitsap County has experienced a substantial increase in population density in areas proximate to its existing shooting ranges and the County has an interest in ensuring the compatibility of shooting ranges with their surroundings and in minimizing potential safety hazards created by the operation of shooting ranges; and

**WHEREAS**, shooting ranges benefit Kitsap County by providing its residents the opportunity to learn firearm safety, to practice shooting and to participate in amateur recreational firearm sports in a safe, controlled setting; and

**WHEREAS**, the Washington Constitution, Article XI, Section 11, confers upon county legislative authorities the police power to adopt regulations necessary to protect the health, safety and well-being of its residents; and

**WHEREAS**, RCW 36.32.120(7) provides that the county legislative authorities shall make and enforce, by appropriate resolutions or ordinances, all such police and sanitary regulations as are not in conflict with state law; and

**WHEREAS**, RCW 9.41.290 provides that the State of Washington fully occupies and preempts the entire field of firearms regulations within its boundaries and counties may only enact ordinances as expressly authorized by RCW 9.41.300; and RCW 9.41.300(2) provides that a county may also, by ordinance, restrict the discharge of firearms in any portion of its jurisdiction where there is a reasonable likelihood that humans, domestic animals, or property will be jeopardized so long as such ordinance shall not abridge the right of the individual guaranteed by Article I, section 24 of the state Constitution to bear arms in defense of self or others; and

**WHEREAS**, the Kitsap County Board of Commissioners (Board) finds that the requirement of an operating permit for the establishment and operation of all shooting ranges provides assurance of the safe conduct of recreational and educational shooting activities in Kitsap County.

**BE IT ORDAINED:**

**Section 1.** Kitsap County Code, Chapter 10.24, last amended by Ordinance 500-2013 is hereby repealed in its entirety.

**NEW SECTION. Section 2.** A new Chapter 10.25 "Firearms Discharge" is added to the Kitsap County Code as follows:

## **Article 1 – No-Shooting Areas**

10.25.010 – Definitions

10.25.020 – Discharge of Firearms – Areas where Prohibited

10.25.030 – Exceptions

10.25.040 – Designation of additional no-shooting areas through petition method.

## **Article 2– Ranges**

10.25.060 – Purpose

10.25.070 – Definitions

10.25.090– Ranges – Operating Permit required.

10.25.110 – Shooting facility environmental controls.

10.25.120 –Review Committee

10.25.130 –Exceptions.

10.25.140–Application and construction of this Chapter.

## **Article 1 – No-Shooting Areas**

### **10.25.010 Definitions.**

The following definitions shall apply in the interpretation and enforcement of the ordinance codified in this article:

(1) “Firearm” means any weapon or device by whatever name known which will or is designed to expel a projectile by the action of an explosion. The term “firearm” shall include but not be limited to rifles, pistols, shotguns and machine guns. The term “firearm” shall not include devices, including but not limited to “nail guns,” which are used as tools in the construction or building industries and which would otherwise fall within this definition.

(2) “Ordinary high water mark” means that mark on all lakes, streams and tidal water which will be found by examining the bed and banks in ascertaining where the presence and action of waters are so common and usual and so long continued in all ordinary years as to mark upon the soil a characteristic distinct from that of the abutting upland in respect to vegetation; provided, that in any area where the ordinary high water mark cannot be found the ordinary high water mark adjoining salt water shall be the line of mean higher high tide.

(3) “Range” means a place set aside and designated for the discharge of firearms for individuals wishing to practice, improve upon or compete as to their shooting skills.

(4) “Shoreline” means the border between a body of water and land measured by the ordinary high water mark.

**10.25.020 Discharge of firearms – Areas where prohibited.**

(1) The discharge of firearms is prohibited within five hundred yards of any shoreline in the unincorporated areas of Kitsap County.

(2) The discharge of firearms in the unincorporated areas of Kitsap County is further prohibited in the following instances:

(a) In any area designated as a “no shooting” area pursuant to Section 10.25.040 of this chapter; specifically:

(i) Section 23, Township 25, Range 1 West, Willamette Meridian, Kitsap County, Washington, except for the following area: The southwest quarter except that portion lying northeast of the Seabeck Highway, of Section 23, Township 25, Range 1 West, Willamette Meridian;

(ii) That area bounded on the west by Bethel-Burley Road, on the north by Burley-Olalla Road, on the east by Bandix Road, and on the south by the Kitsap County/Pierce County line;

(iii) That area bounded on the west by a line that begins at the southwest corner of tax parcel number 252301-4-012-1009, thence in a straight line northeasterly to the northeast corner of tax parcel number 252301-1-019-1008, thence north along the east boundary of tax parcel number 252301-1-018-1009 to its intersection with the south boundary of tax parcel number 252301-4-013-1009, thence west along said south boundary to the southwest corner of said tax parcel, thence north along the western boundary of said tax parcel to the intersection of Southwest Lake Flora Road, thence easterly along the southerly right-of-way of said road to its intersection with J. M. Dickenson Road Southwest, thence southwesterly along the westerly right-of-way of said road to its intersection with the eastern boundary of tax parcel number 252301-4-018-1003, thence north along said boundary to the northeast corner of said parcel, thence west along the northern boundary of said parcel to the Alpine Lake No-Shooting Area.

(b) On any parcel of land less than five acres in size;

(c) Towards any building occupied by people or domestic animals or used for the storage of flammable or combustible materials where the point of discharge is within five hundred yards of such building;

(d) Later than ½ hour after sunset or earlier than ½ hour before sunrise unless otherwise authorized under state hunting regulations.

(e) Within five hundred yards of the following lakes located, in whole or in part, in the unincorporated areas of Kitsap County: Long Lake, Kitsap Lake, Wildcat Lake, Panther Lake, Mission Lake, Tiger Lake, William Symington Lake, Tahuya Lake, Island Lake, Horseshoe Lake, Carney Lake, Wye Lake, Buck Lake, Fairview Lake and Bear Lake.

(f) Nothing in this section shall be construed or interpreted as abridging the right of the individual guaranteed by Article I, Section 24 of the state Constitution to bear arms in defense of self or others.

#### **10.25.030 Exceptions.**

The provisions of Section 10.25.020 shall not apply to the discharge of firearms:

(1) By law enforcement officers, including Washington State Department of Fish and Wildlife officers, or security personnel in the course of their official duties;

(2) On a shooting range, provided that any such range shall comply with the criteria for ranges adopted by the Kitsap County board of commissioners pursuant to Article 2 of this chapter;

(3) In the course of farm slaughter activities.

#### **10.25.040 Designation of additional no-shooting areas through petition method.**

(1) The establishment or disestablishment of a “no shooting” area in addition to those described in Section 10.25.020 may be requested by petition by the registered voters residing in such proposed additional areas. Such petition may include a request that the discharge of certain types of firearms be nevertheless allowed during certain times and under certain conditions. The superintendent of a school district may also request by petition that school property within that district which is located in the unincorporated area of Kitsap County and on which a building having an occupancy classification of “E” under the Uniform Building Code is situated, together with the area within five hundred yards of the school property’s perimeter, be designated as a “no shooting” area. Any such petition shall be presented to the Kitsap County board of commissioners and shall substantially comply in content with the following criteria:

(a) The proposed area shall contain a minimum of fifty dwelling units or, in the alternative, a minimum area of one square mile;

(b) The proposed area shall have readily identifiable boundaries, which shall be shown on a map attached to the petition;

(c) A petition requesting that the discharge of certain types of firearms be nevertheless



allowed during certain times and under certain conditions shall set forth with specificity the types of firearms, times and conditions being proposed;

(d) The petition for the proposed area shall bear the signatures of at least fifty-one percent of the proposed area's registered voters; provided, however, that a petition for a "no shooting" area involving school property need be signed only by the superintendent of the school district in which the school property is located.

(e) Ranges permitted under Article 2 of this chapter shall not be declared a no-shooting area by petition method.

(2) A petition for a "no shooting" area shall be in substantially the following form:

PETITION TO CREATE A "NO SHOOTING" AREA

To: The Kitsap County Board of Commissioners

We, the undersigned citizens of Kitsap County, State of Washington, being legally registered voters within the respective precincts set opposite our names, do hereby respectfully request that the area generally known as \_\_\_\_\_ be established as a "No Shooting" area pursuant to Kitsap County Code Section 10.25.020.

We further request that the discharge of certain types of firearms, commonly known as \_\_\_\_\_, be nevertheless allowed during certain times of the year, namely, \_\_\_\_\_, under the following conditions:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_
4. \_\_\_\_\_
5. \_\_\_\_\_

The proposed area's boundaries are shown on the attached map and are generally described as follows:

*[Here insert proposed area boundary description]*

Each of us says:

(1) I am a legally registered voter of the State of Washington in the precinct written after my name below.

(2) The portion of such precinct within which I reside is included within the proposed “No Shooting” area.

(3) My residence address is correctly stated below.

(4) I have personally signed this petition.

<b>Petition Name and Signature</b>	<b>Precinct Name</b>	<b>Residence Address Number and Street</b>	<b>City or PO Box No.</b>	<b>Zip Code</b>

Failure of a petition to comply with any of the above format shall not automatically invalidate such petition but shall be a matter for consideration by the Kitsap County board of commissioners as to whether the intent and standards of this section have been met.

(3) Upon the receipt of such a petition, the board of commissioners shall forward the petition to the Kitsap County auditor for verification of the signature requirements of this section. Upon the return of area verification from the auditor, the board shall set the matter for consideration at the next regularly scheduled public hearing or as soon thereafter as it may appropriately be heard.

(4) At any time after one year from the effective date of the establishment of a “no shooting” area pursuant to this section, the residents of such area may seek abrogation of such by the same procedure provided in this section for the establishment of a “no shooting” area, provided however, that in the event of such abrogation, Section 10.25.020 of this chapter shall remain in full force and effect as to that area.

## **Article 2– Shooting Ranges**

### **10.25.060 Purpose.**

The purpose of this Article is to provide for and promote the safety of the general public by establishing a permitting procedure and rules for the development and operation of shooting range facilities. The shooting range standards adopted herein are intended to protect and

safeguard participants, spectators, neighboring properties and the public, while promoting the continued availability of shooting ranges for firearm education, practice in the safe use of firearms, and recreational firearm sports.

#### **10.25.070 Definitions.**

The following definitions shall apply in the interpretation and enforcement of the ordinance codified in this article:

- (1) “Backstop” means a device constructed to stop or redirect bullets fired on a range, usually directly behind the target line.
- (2) “Baffles” means barriers to contain bullets and/or to reduce, redirect or suppress sound waves. Baffles are placed either overhead, alongside or at ground level to restrict or interrupt errant or off-the-target shots.
- (3) “Ballistic trauma” means a form of physical trauma sustained from the discharge of arms or munitions. Commonly it is the penetration of the body by a bullet, marked by a small entrance wound and a larger exit wound. The wound is usually accompanied by damage to blood vessels, bones, and other tissues.
- (4) “Berm” means an embankment used for restricting bullets to a given area, or as a protective or dividing wall between shooting areas.
- (5) “Buffer” means a non-clearing native vegetation area which is intended to protect the functions and values of critical areas.
- (6) “Cowboy action shooting” means a type of match utilizing one or a combination of pistol(s), rifle, and/or shotgun in a variety of "old west themed" courses of fire for time and accuracy.
- (7) “Department” means the Kitsap County Department of Community Development.
- (8) “Firearm” means any weapon or device by whatever name known which will or is designed to expel a projectile by the action of an explosion. The term “firearm” shall include but not be limited to rifles, pistols, shotguns and machine guns. The term “firearm” shall not include devices, including but not limited to “nail guns,” which are used as tools in the construction or building industries and which would otherwise fall within this definition.
- (9) “Firing Line” means a line parallel to the targets from which firearms are discharged.
- (10) “Firing point” means a location from which one individual fires at an associated target down range.
- (11) “Five stand shooting” means a shotgun shooting sport where there are five stations or stands on the firing line and multiple strategically placed target throwers that throw targets in front of the firing line.

(12) “Integrated Lead Management Program Plan” means a written plan that details the specific design and operational elements that a shooting range employs to control and contain lead bullets and bullet fragments; prevents the migration of lead to surface and ground waters; removes accumulated lead bullets and bullet fragments from the shooting range for recycling; and, documents and reports the plans implementation work.

(13) “Life Safety Violation” means an incident that causes substantial bodily harm to an individual or domestic animal, e.g., a bullet wound resulting in a 911 notification; or damage to a structure that results in a call to 911, Sheriff’s Office, or the Department for investigation.

(14) “Physical containment” means the use of physical barriers that are sufficient to contain the projectile from the highest power firearm used on a shooting range. Physical barriers include baffles, sidewalls, backstops and berms of adequate design, quantity and location to ensure that no errant projectiles can escape the shooting range,

(15) “Practical shooting” means a sport which challenges an individual’s ability to shoot rapidly and accurately with a full-power handgun, rifle, or shotgun. To do this, shooters take on obstacle-laden shooting courses called *stages*, some requiring many shots to complete, and others just a few. While scoring systems vary between practical shooting organizations, each measures the speed with which the stage is completed, with penalties for inaccurate shooting.

(16) “Range Officer (RO)” or “Range Safety Officer (RSO)” or “safety officer” means a person or persons appointed by the operators of a shooting facility to oversee the safe discharge of firearms in accordance with any conditions of permit approval and any other additional safety rules and procedures adopted by the operators of the shooting facility.

(17) “Routine maintenance” means simple, small-scale activities (e.g., repairing berms using less than 150 cubic yards of soil; repairing structures such that a building permit is not required under county code, etc.) associated with regular (daily, weekly, monthly, etc.) and general upkeep of a structure of existing building, firing line, target line, parking lots, etc. Routine maintenance activities are associated with maintaining a facility in its original condition; expansion and construction of new firing positions on a firing line, new ranges, etc. are not routine maintenance.

(18) “Rules and Regulations” means standards used in the operation of a Facility. Rules and regulations are set up to govern the Facility operations and are normally part of the facility’s safety plan.

(19) “Safety fan” means all areas in or around a range where projectiles, including errant projectiles, may impact or ricochet. The length of the safety fan extends to the maximum range of the cartridge and firearm used on the firing range unless adequate physical containment is provided. When physical containment is adequate, the safety fan is limited to the area within the containment.

(20) “Safety Plan” means the written procedures and or policies of a shooting facility specifically

defining the safety requirements utilized at that facility.

(21) “Shooting facility” or “facility” means an entity with a site having one or more shooting ranges, but does not include residential property.

(22) “Shooting range” or “range” means a place set aside and designated for the safe discharge of firearms for individuals wishing to practice, improve upon or compete as to their shooting skills. There may be one or more ranges located at a shooting facility.

(23) “Skeet shooting” means a shotgun shooting sport where firer is on the firing line and fires at targets launched from two houses in a somewhat sideways paths that intersect in front of the shooter.

(24) “Sporting Clays” means a form of Clay Pigeon Shooting which consists of multiple shooting stations laid out over natural terrain such that target presentations simulate the unpredictability of live quarry shooting.

(25) “Target Line” means the line where targets are placed.

(26) “Trap shooting” means a shotgun shooting sport where a firer on the firing line shoots at targets launched from a single launching point and generally away from the shooter.

(27) “Wetlands” means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include, but are not limited to swamps, marshes, estuaries, bogs, and ponds less than twenty acres, including their submerged aquatic beds and similar areas. Wetlands do not include those artificial wetlands intentionally created from non-wetland sites, including, but not limited to, irrigation and drainage ditches, grass-lined swales, canals, storm water facilities, wastewater treatment facilities, farm ponds, and landscape amenities, or those wetlands created after July 1, 1990, that were unintentionally created as a result of the construction of a road, street, or highway. Wetlands include those artificial wetlands intentionally created from non-wetland areas to mitigate the conversion of wetlands.

#### **10.25.090 Ranges – Operating Permit required.**

(1) Shooting facilities shall be authorized and operated in accordance with an operating permit issued by the department. The operating permit shall govern the facilities and scope of operations of each shooting facility, and shall be issued, denied or conditioned based upon the standards set forth in this Article. No proposed or existing shooting facility may operate without an operating permit issued pursuant to this chapter, except as provided in section (2) herein. This operating permit is not intended to alter the legal nonconforming use status and rights of existing ranges, which are governed by Title 17 Kitsap County Code (KCC) and the common law, nor shall this operating permit authorize expansion of range uses which otherwise require approval pursuant to a Conditional Use Permit or other land use permits per Title 17 KCC. Failure to obtain a range operational permit will result in closure of the range until such time a permit is obtained. Ranges

that operate without a permit are subject to code compliance enforcement, including but not limited to injunctive relief.

(2) Each owner or operator of a shooting facility shall apply for and obtain an operating permit. The owner or operator of a proposed new shooting facility shall apply for the facility operating permit at the time of application for any necessary building or land use permits. The owner or operator of an established shooting facility in active use on the effective date of this ordinance shall apply for the initial facility operating permit not later than 90 days after the effective date of this ordinance. A shooting facility operating permit is valid for five (5) years from the date of issuance or renewal. The owner or operator of each facility shall apply for a permit renewal at least thirty (30) days prior to the date of current permit expiration.

(3) In reviewing a new application for a shooting facility operating permit, or renewal of an existing permit, the department shall be guided by the current edition of the "NRA Range Source Book" published by the National Rifle Association. Reference to the NRA Range Source Book may not be used as the basis for any claim of civil liability against the NRA or against Kitsap County or its officers, directors, employees, agents or representatives based upon deviation from, citation to, or reliance upon the NRA Range Source Book.

(4) Shooting facilities shall meet the following standards:

(a) Each shooting range within a shooting facility shall be designed, constructed, operated and maintained to contain bullets, shot or other discharged projectiles within the facility property. A shooting facility shall use the NRA Range Source Book, or other engineered specifications that meet or exceed the standards established by the Source Book, as a minimum to develop and implement institutional and facility controls for the safe operation, improvement and construction of shooting ranges. Facilities should engineer and construct facilities to reduce sound impacts on neighboring communities to the maximum extent feasible.

(i) Rifle and pistol ranges that allow modern smokeless powder cartridges or center-fired cartridges shall provide adequate physical containment of projectiles in addition to any institutional controls. Adequate physical containment requires the use of the appropriate combination of overhead baffles, impact berms and sidewalls or side berms.

(ii) Overhead baffles shall be constructed of material of sufficient design to stop and contain any projectile fired from the most powerful cartridge authorized for use on that specific range, shall be placed at intervals that are sufficient to eliminate the possibility of a projectile to be fired over the top of any preceding or successive baffle, and shall extend downrange far enough to prohibit a projectile being fired over the top of the impact berm.

(iii) Impact berms shall be constructed of material of sufficient height and thickness to stop and contain any projectile fired from the most powerful cartridge authorized for use on that specific range at any elevation that is not contained by the last overhead baffle. The

surface of the impact berm should be free of large rocks and debris to reduce ricochet.

(iv) Sidewalls or side berms shall be constructed of material of sufficient height and thickness that will stop and contain any projectile fired from the most powerful cartridge authorized for use on that specific range at any elevation that is not contained by an overhead baffle or impact berm.

(b) Each shooting range shall have a Safety Plan as described herein. Each shooting range shall be used only for the shooting activities identified in the Safety Plan.

(c) Designs and safety procedures shall be evaluated by an NRA Range Technical Team Advisor (RTTA) or by a professional engineer with experience in shooting facilities or other qualified professional consultant with experience and expertise in the evaluation and design of shooting ranges. Qualified professional consultants must demonstrate their education, experience and expertise by identifying their certifications from nationally recognized shooting organizations that provide such certifications, the number and location of shooting facilities they have designed or evaluated and contact information for those facilities. Their home facility will not count towards this qualification.

(d) A shooting facility shall have at least one qualified safety officer present when open to the public. When the facility is closed to the public, a facility member who has passed the minimum training requirements of the range shall be present.

(e) Shooting facilities shall meet all applicable local fire codes when storing explosives.

(f) A shooting range may not be used for training of units of any branch of the United States military, National Guard or Reserve Forces, or Homeland Security, unless the facility's application identifies all proposed activities, types and calibers of firearms to be used, and the facility is currently certified by the regional command as meeting the service's range safety manuals and standards. This does not restrict individual members of the military, National Guard or Reserve Forces, or Homeland Security to use a shooting facility for improving their individual skills with privately owned firearms.

(g) A facility may allow the use of exploding targets (e.g. Tannerite, etc.) as provided in this subsection. Use of exploding targets is limited to one day per calendar month during a designated four-hour period between the hours of 9 a.m. to 5 p.m. The facility must designate the day and time of use in its application. If used, exploding targets must meet parameters defined and identified in the Safety Plan, including that exploding targets shall only be used within the parameters defined by the manufacturer, and shall not exceed one-half pound of mixture. A facility allowing use of exploding targets shall demonstrate how it mitigates the noise impacts on surrounding neighbors. Mitigation may be an approved bunkering system that surrounds the target on three sides and forces the sound back towards the shooter and upward.

(h) If a facility utilizes cannon(s) for audio effect purposes, a noise variance per Ch. 10.28

KCC shall be required.

(i) All shooting facilities shall provide a means for participants and spectators to readily contact emergency services such as fire or medical aid.

(j) Shooting facilities within 500 yards of a shoreline, wetland or wetland buffer must orient the firing away from these areas or demonstrate how bullets are contained so that they do not enter these areas.

(k) Firing lines, targets and target lines must be located so that the direction of fire is not toward any structure housing people or domestic animals located within 500 yards of the point of discharge.

(l) Shooting facilities conducting cowboy action shooting, practical shooting, and similar sports shooting matches must meet the following requirements:

- (i) A shooting facility is limited to two (2) competition events per calendar month; and
- (ii) All such competition events or practices shall take place on a range constructed in compliance with section (4)(a); and
- (iii) For any competition event or practice in which shooting takes place where overhead baffling is not present, an on-duty range control officer must be present at the practice site alongside the shooter; and
- (iv) For practice in which shooting takes place where overhead baffling is not present, the facility must limit the hours of practice to daylight hours between nine (9) a.m. to five (5) p.m.; and
- (v) Practice must be restricted to one range at any given time.

(5) Application contents. The application for an initial shooting facility operating permit shall include the following documents:

(a) A Safety Plan, which shall include:

(i). Firearm handling rules, general range rules, specific range rules and administrative rules and regulations established by the owner/operator to include any firearms and or caliber restrictions on specific shooting areas.

(ii) Emergency Plan, to include provision for timely notification to the Kitsap County Sheriff's Office and to the department of any type of ballistic trauma with initial notification within a 96 hour time period. The accidental or unintended release of a bullet from a shooting area shall be documented by the facility and available for inspection by the department as requested.

(iii) Brief description of the facility training plan for Range Safety Officers and others.

(iv) Ranges conducting cowboy action shooting, practical shooting, and similar sports shooting matches shall follow the guidelines established by the sporting association that



governs such matches and include it in the Safety Plan. The facility will identify the association governing the match and attach the safety guidelines to the permit application. If no such guidelines exist, then as a minimum, each shooter will have a range control officer within arm's length to ensure control of the direction of the firearm's muzzle. The range control officer can also perform as the timer of these activities.

(b) Shooting facility layout and design which shall include:

(i) Dimensional drawings of physical layout to include orientation of each shooting area, location and description of terrain and any natural vegetation, and locations of critical areas, buildings, structures, fences, gates, roadways, trails, foot paths, major lighting, signage, and parking areas.

(ii) Locations of firing lines or firing points, target lines and impact areas to include any backstops, berms, containment structures and any baffles or side containment structures.

(iii) For practical shooting ranges without overhead baffles, a safety fan diagram based on the most powerful cartridge proposed to be shot on the range.

(c) An evaluation of the facility design and Safety Plan.

(i) The evaluation must be performed by a NRA Range Technical Team Advisor (RTTA) or a Professional Engineer with expertise in the design of shooting ranges that reports any safety issues or proposed uses which are inconsistent with the NRA Range Source Book for facility designs and institutional controls or qualified consultant that meets the credentials previously stated. The evaluation must be in written form and signed by the evaluator.

(ii) The department may, at County expense, arrange for an additional or independent inspection and evaluation of the shooting facility, including the facility's uses and institutional controls described in an application for an operating permit. In cases where there is dispute between the evaluation provided by the facility and the evaluation performed at the option of the county, the dispute shall be decided by the Hearing Examiner pursuant to KCC Title 21.

(d) For exploding targets used on a facility, plans for mitigation of noise impacts on neighbors.

(6) Each owner or operator of a shooting facility must apply to the department for an amendment to the operating permit when additional firing lines, firing lanes, or shooting ranges are proposed or the design of any facility range is altered beyond the scope of the original permit approval. Such proposed changes shall not be implemented prior to department approval.

(a) Routine maintenance of existing berms, backstops, structures and facilities shall not be construed as a change requiring an amendment to an operating permit.

(b) Changes to shotgun range configuration or Safety Plan procedure shall not be construed as a change requiring an amendment to an operating permit if the discharged shot is wholly contained on the shooting facility property.

(c) Changes to rifle or pistol range configuration or Safety Plan procedure shall not be construed as a change requiring an amendment to an operating permit if the direction of fire and safety structures are not altered and the safety procedures are not reduced.

(7) An application for renewal of an operating permit shall include a current copy of the facility Safety Plan. Permit renewal does not require the submittal of layout and design documents or a written evaluation by an RTTA or Professional Engineer if the shooting facility range design has not been altered from previously approved submittals. However, the application must include a written statement by the owner of the facility declaring that no such changes have been made.

(8) During the operating permit review or renewal process, the department shall inspect the facility to determine that the ranges are consistent with the application descriptions and to assess any deficiencies or corrective actions necessary to meet the intent of this Article. The department shall inform the applicant of any deficiencies or corrective actions to be taken and allow a reasonable time for the owner/operator to take corrective action. The department may re-inspect the facility to verify corrective action.

(9) Application for a new or renewed operating permit shall be processed, reviewed and be appealable under the procedures for a Type I Director's Decision pursuant to KCC Title 21. Permit renewals shall be issued without additional restrictions provided there have been no substantial changes to range design or operation. Permit renewals may not be unreasonably withheld. Shooting facilities shall be allowed to continue operations while a review of a permit renewal is performed.

(10) Upon receiving evidence of noncompliance with the operating permit or receiving evidence of a reasonable likelihood that humans, domestic animals, or property have been or will be jeopardized, the department will contact the shooting facility within 24 hours and will give the facility a written notice of the complaint. The owner/operator shall make the facility available for inspection not later than 48 hours after receiving a request for an inspection.

(a) If the department concludes there is a life safety violation of this Article or the terms of the operating permit, the department may suspend or modify the permit to close the range or modify range operations and shall provide the owner/operator a written notice that shall set forth each claimed violation with a specific reference to the applicable Article provision and/or permit condition. The owner or operator shall have thirty (30) days to respond in writing and to take any necessary corrective measures. The department shall be provided access to the shooting facility to verify compliance after providing notice and scheduling an appointment. An operational range permit that has been suspended requires the shooting facility to cease any firing activities.

(b) A department decision to suspend, modify, or revoke an operating permit may be appealed

to the Hearing Examiner pursuant to Title 21 KCC.

(11) Nothing in this section or any other provision of this Article shall be construed as authorizing an application or a permit for a shooting facility to be located in whole or in part in an area designated as an area where the discharge of firearms is prohibited under Ch. 10.25 KCC Article 1. Shooting ranges in such areas are expressly prohibited. Nothing in this Article shall be construed as permitting the discharge of firearms the ownership or possession of which is otherwise prohibited by law. Nothing in this Article shall be construed as permitting the use or possession of a firearm by an individual who is otherwise prohibited by law from owning or possessing that firearm.

#### **10.25.110 Shooting facility environmental controls.**

Each shooting facility operator shall develop and submit an Integrated Lead Management Program Plan to reclaim lead deposited by shooting activities. This plan will be reviewed by the Kitsap Public Health District.

#### **10.25.120 Review committee.**

The Kitsap County Board of Commissioners may direct the Director of Community Development to establish a review committee to evaluate proposed changes to the shooting facility requirements governed by this Article. The committee will consist of the Director of the Department of Community Development or the Director's designee (chair), Kitsap County Sheriff or the Sheriff's designee, a representative of each currently permitted shooting facility in unincorporated Kitsap County and an equal number of citizens-at-large appointed by the Kitsap County Board of Commissioners. The citizens-at-large shall go through the appropriate application process. An appointed citizen-at-large may not be a member of or affiliated with any established shooting facility in unincorporated Kitsap County.

#### **10.25.130 Exceptions.**

(1) Shooting facilities and ranges that solely conduct trap, skeet, sporting clay or five stand shooting operations are exempt from this ordinance if they meet the following conditions:

- (a) Shells fired are not greater than #7 ½ shot; and
- (b) The facility has sufficient land to contain all shot fired.

#### **10.25.140 Application and construction of this Chapter.**

A facility may not generate noise at a level that creates a public nuisance. Notwithstanding any other provision in this chapter, upon obtaining a ruling from a court of record that a shooting facility has been found to create a public nuisance, the department may require additional noise,

environmental or safety controls as a condition of continuing a shooting facility operating permit. No provision of this chapter shall act to nullify or render void the terms of any existing or future injunctive order issued by a court of record pertaining to operations or activities at a shooting range or shooting facility. No provision of this chapter shall be construed to allow or authorize the discharge of firearms otherwise prohibited by state or federal law.

**Section 3.** Severability. If any provision of this ordinance or its application to any person or circumstance is held invalid or unconstitutional, the remainder of the ordinance or its application to other persons or circumstances shall not be affected.

**Section 4.** Recitals. The recitals herein shall be findings of fact and are incorporated herein by reference.

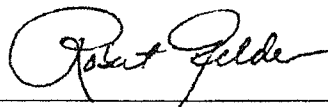
**Section 5.** Effective Date. This Ordinance shall take effect on the earlier of (a) the date of approval by the Washington Department of Ecology pursuant to WAC 173-60-110; or (b) ninety (90) days after submittal to the Department of Ecology pursuant to RCW 70.107.060. The department shall notify existing shooting ranges subject to this ordinance of the effective date.

ADOPTED this 22nd day of September, 2014.


**BOARD OF COUNTY COMMISSIONERS  
KITSAP COUNTY, WASHINGTON**



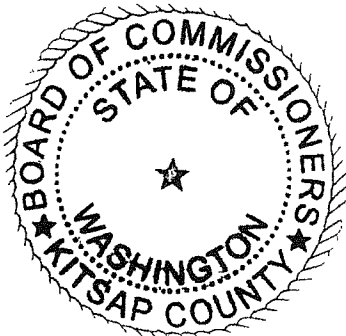
CHARLOTTE GARRIDO, Chair



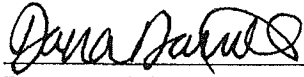
ROBERT GELDER, Commissioner



LINDA STREISSGUTH, Commissioner

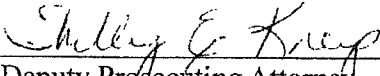


ATTEST:



Dana Daniels, Clerk of the Board

APPROVED AS TO FORM:



Deputy Prosecuting Attorney



FILE

KITSAP COUNTY RESOLUTION NO. 087 2009

**A Resolution to Assign and Convey Certain Real Estate**

WHEREAS, Kitsap County (County) has been negotiating with the State Department of Natural Resources (DNR) regarding a land exchange in the Central Kitsap area ("the Newberry Hill Land Exchange"); and

WHEREAS, the County has determined that the land transfer with DNR is in the public interest as it will provide contiguous county ownership that will enable more efficient and effective local management and enhanced park, recreational and open space facilities for County residents; and

WHEREAS, a portion of the property DNR intends to transfer to Kitsap County will include the assignment of a lease for a portion of property currently leased to the Kitsap Rifle and Revolver Club (KRCC) for use as a shooting range; and

WHEREAS, the State of Washington has recognized a need to preserve and rehabilitate shooting ranges that provide important benefits to the public for access and recreation; use by law enforcement and military personnel; and use for firearm training, competition, and hunter safety education classes; and

WHEREAS, KRRC currently meets the stated needs for Kitsap County by its operation of the shooting range as a private nonprofit facility; and

WHEREAS, the County finds that it is in the public interest for firearm safety as well as in the best economic interest of the County to provide that KRRC continue to operate with full control over the property on which it is located; and

WHEREAS, the County has had the KRRC shooting range property appraised, and the appraisal of the property as it is currently used and will be continued in use is less than \$2,500; and

WHEREAS, pursuant to RCW 36.34.020, Kitsap County may dispose of the KRRC property without a public bidding process.

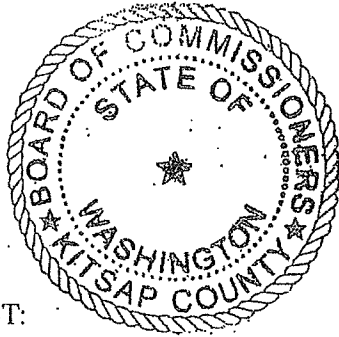
NOW THEREFORE, be it resolved:

The Board of County Commissioners hereby authorizes the assignment and sale of the portion of the property acquired under the DNR/County land exchange, which is more specifically described in Exhibit A, attached hereto and incorporated herein, to the Kitsap Rifle and Revolver Club. Consideration by the KRRC shall include, but not be limited to, covenants to maintain and operate the property as a shooting range with public access, retention of certain easements by the County, other environmental considerations, and assumption of liability for the property and the use of the property.

BE IT FURTHER RESOLVED:

The conveyance to KRRC shall take place as soon as is practicable after the property is conveyed to Kitsap County by DNR. The Chair of the Board of the County Commissioners is hereby authorized to sign the necessary documents required to convey the property to the KRRC.

DATED this 11th day of May, 2009.



ATTEST:

Opal Robertson  
Opal Robertson  
Clerk of the Board

**BOARD OF COUNTY COMMISSIONERS  
KITSAP COUNTY, WASHINGTON**

Charlotte Garrido  
CHARLOTTE GARRIDO, Chair

Steve Bauer  
STEVE BAUER, Commissioner

Josh Brown  
JOSH BROWN, Commissioner





FILED FOR RECORD AT REQUEST OF:  
Kevin M. Howell  
Kitsap County Prosecuting Attorney's Office  
614 Division Street, MS-35A  
Port Orchard WA 98366

LAND TITLE 200906180292

Deed Rec Fee: \$ 89.00

06/18/2009 03:15 PM

Walter Washington, Kitsap Co Auditor

Page: 1 of 6

**BARGAIN AND SALE DEED  
WITH RESTRICTIVE COVENANTS**

*E-230260*

**GRANTOR:** Kitsap County

**GRANTEE:** Kitsap Rifle and Revolver Club, a Washington Non-Profit Corporation

**LEGAL DESCRIPTION:** SE/SW&SW/SE 36-25N-1W KITSAP COUNTY TREASURER EXCISE

06/18/2009

**2009EX03102**

Total : \$10.00

Clerk's Initial *JS*

**ASSESSOR'S TAX PARCEL NO:** 362501-4-002-1006

For and in consideration of \$10.00 and other good and valuable consideration, Kitsap County, as Grantor, bargains, sells and conveys all of it's right, title and interest in and to the real property described on Exhibit A hereto to the Kitsap Rifle and Revolver Club, a Washington Non-Profit Corporation, as Grantee.

This conveyance is made subject to the following covenants and conditions, the benefits of which shall inure to the benefit of the public and the burdens of which shall bind the Grantee and the heirs, successors and assigns of the Grantee in perpetuity.

1. Grantee for and on behalf of itself, its heirs, successors and assigns, and each subsequent owner of the property described in Exhibit A hereto, hereby releases and agrees to hold harmless, indemnify and defend Kitsap County, its elected officials, employees and agents from and against any liabilities, penalties, fines, charges, costs, losses, damages, expenses, causes of actions, claims, demands, orders, judgments, or administrative actions, including, without limitation, reasonable attorneys' fees, arising from or in anyway connected with (1) injury to or

the death of any person or the physical damage to any property, resulting from any act, activity, omission, condition or other matter related to or occurring on or about the property, regardless of cause, unless due solely to the gross negligence of any of the indemnified parties; (2) the violation or alleged violation of, or other failure or alleged failure to comply with, any state, federal, or local law, regulation or requirement, including, without limitation, Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 USC Sec. 9601, et seq. and Model Toxics Control Act (MTCA), RCW 70.105 D, by any indemnified person or entity in anyway effecting, involving, or relating to the property; (3) the presence or release in, on, from, or about the property, at any time, past or present, of any substance now or hereafter defined, listed, or otherwise classified pursuant to any federal, state or local law regulation, or requirement as hazardous, toxic, polluting, or otherwise contaminating to the air, water, or soil, or anyway harmful or threatening to human health or the environment.

2. Grantee shall maintain commercial general liability insurance coverage for bodily injury, personal injury and property damage, subject to a limit of not less than \$1 million dollars per occurrence. The general aggregate limit shall apply separately to this covenant and be no less than \$2 million. The grantee will provide commercial general liability coverage that does not exclude any activity to be performed in fulfillment of Grantee's activities as a shooting range. Specialized forms specific to the industry of the Grantee will be deemed equivalent, provided coverage is no more restrictive that would be provided under a standard commercial general liability policy, including contractual liability coverage.

3. Grantee shall confine its active shooting range facilities on the property consistent with its historical use of approximately eight (8) acres of active shooting ranges with the balance of the property serving as safety and noise buffer zones; provided that Grantee may upgrade or improve the property and/or facilities within the historical approximately eight (8) acres in a manner consistent with "modernizing" the facilities consistent with management practices for a modern shooting range. "Modernizing" the facilities may include, but not be limited to: (a) construction of a permanent building or buildings for range office, shop, warehouse, storage, caretaker facilities, indoor shooting facilities, and/or classrooms; (b) enlargement of parking facilities; (c) sanitary bathroom facilities; (d) re-orientation of the direction of individual shooting bays or ranges; (e) increasing distances for the rifle shooting range; (f) water system improvements including wells, pump house, water distribution and water storage; (g) noise abatement and public safety additions. Also, Grantee may also apply to Kitsap County for expansion beyond the historical eight (8) acres, for "supporting" facilities for the shooting ranges or additional recreational or shooting facilities, provided that said expansion is consistent with public safety, and conforms with the terms and conditions contained in paragraphs 4, 5, 6, 7 and 8 of this Bargain and Sale Deed and the rules and regulations of Kitsap County for development of private land. It is the intent of the parties that the activities of Grantee shall conform to the rules and regulations of the Firearms Range Account, administered by the State Recreation and Conservation Office. This account

is established by the legislature upon the following finding: "Firearms are collected, used for hunting; recreational shooting, and self-defense, and firearm owners as well as bow users need safe, accessible areas in which to shoot their equipment. Approved shooting ranges provide that opportunity, while at the same time, promote public safety. Interest in all shooting sports has increased while safe locations to shoot have been lost to the pressures of urban growth." (Wash. Laws 1990 ch. 195 Section 1.)

4. Grantee's activities shall also conform to the Firearms and Archery Range (FARR) Program as found in Chapter 79A.25 RCW. The primary goals of this program are to assist with acquisition, development, and renovation of firearm and archery range facilities to provide for increased general public access to ranges. This includes access by a) law enforcement personnel; b) members of the general public with concealed pistol or hunting licenses; and c) those enrolled in firearm or hunter safety education classes. Access by the public to Grantee's property shall be offered at reasonable prices and on a nondiscriminatory basis.

5. Grantee agrees to operate the shooting range at all times in a safe and prudent manner and conform its activities to accepted industry standards and practices.

6. Mineral Reservations, held by the State of Washington, that run with the land.

7. Existing Habitat Conservation Plan (HCP), as detailed below:

The site has been publicly identified for conservation provisions applying to, but not limited to: murrelet habitat; spotted owl nest sites; wolves; grizzly bears; nests, communal roosts, or feeding concentrations of bald eagles; peregrine falcon nests; Columbian white-tailed deer; Aleutian Canada geese; and Oregon silverspot butterflies. The existing Habitat Conservation Plan is to remain in effect, regardless of parcel segregation or aggregation or potential sale or land transfer.

8. Riparian Management Zones, as detailed below:

Bodies of water, including but not limited to those streams, rivers and lakes and other lakes and wetlands have been identified and/or may be located on the Premises. All activities within the Riparian Management Zone, as defined in the existing and publicly-filed Habitat Conservation Plan (HCP) and including that portion of the inner riparian ecosystem between the aquatic zone and the direct influence zone (uplands) and including the outer wind buffer, must comply with and remain in compliance with the current HCP Procedures. Activities in a Riparian Management Zone, including but not limited to cutting or removing any tree and/or timber (including hardwood, merchantable and unmerchantable timber, downed timber, windthrow and snags), and road, trench and/or trail use, and/or maintenance, may be restricted or not permitted during specific times. All activities must provide for no overall net loss of naturally occurring wetland function. These protective measures are to run with the

land, regardless of parcel segregation or aggregation or potential sale or land transfer.

DATED this 13<sup>th</sup> day of May, 2009.



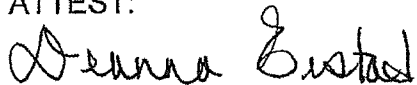
**BOARD OF COUNTY COMMISSIONERS  
KITSAP COUNTY, WASHINGTON**

  
CHARLOTTE GARRIDO, Chair

  
STEVE BAUER, Commissioner


  
JOSH BROWN, Commissioner


ATTEST:

  
Opal Robertson, Clerk of the Board

**ACCEPTANCE OF BARGAIN AND SALE DEED  
WITH RESTRICTIVE COVENANTS**

By signature affixed below, the Kitsap Rifle and Revolver Club by and through its President/Executive Officer hereby and with full authority of the Board of Directors of said corporation, hereby accept the terms and conditions of the Deed with Restrictive Covenants above dated this 13<sup>th</sup> day of May, 2009.

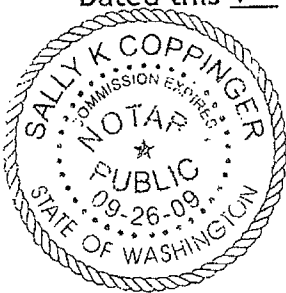
  
BRADFORD SMITH, President - KRRC

  
MARCUS A. CARTER, Executive Officer - KRRC

STATE OF WASHINGTON )  
 ) ss:  
 COUNTY OF KITSAP )

I certify that I know or have satisfactory evidence that Brad Smith is the person who appeared before me, and said person acknowledged that said person signed this instrument, on oath stated that said person was authorized to execute the instrument and acknowledged it as the President of the Kitsap Rifle and Revolver Club, to be the free and voluntary act of the KRRC for the uses and purposes mentioned in the instrument.

Dated this 13 day of May, 2009.

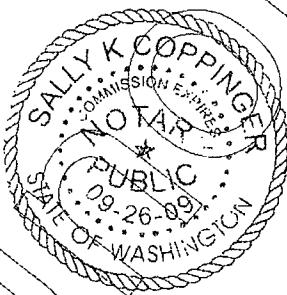


Sally K. Coppinger  
 PRINT NAME: Sally K. Coppinger  
 Notary Public in and for the State of Washington,  
 residing at: Port Orchard 98366  
 My Commission Expires: 9/26/09

STATE OF WASHINGTON )  
 ) ss:  
 COUNTY OF KITSAP )

I certify that I know or have satisfactory evidence that Marcus Carter is the person who appeared before me, and said person acknowledged that said person signed this instrument, on oath stated that said person was authorized to execute the instrument and acknowledged it as the Executive Director of the Kitsap Rifle and Revolver Club, to be the free and voluntary act of the KRRC for the uses and purposes mentioned in the instrument.

Dated this 13 day of May, 2009.



Sally K. Coppinger  
 PRINT NAME: Sally K. Coppinger  
 Notary Public in and for the State of Washington,  
 residing at: Port Orchard 98366  
 My Commission Expires: 9/26/09

## EXHIBIT A

### Legal Description of Premises & Reservations

Part of the Southwest quarter of the Southeast quarter and part of the Southeast quarter of the Southwest quarter of Section 36, Township 25 North, Range 1 West, W.M., lying northerly of the North lines of an easement for right of way for road granted to Kitsap County on December 7, 1929, under Application No. 1320, said road being as shown on the regulation plat thereof on file in the office of the Commissioner of Public Lands at Olympia, Washington, the above described lands having an area of 72.41 acres, more or less.

### RESERVATIONS/SUBJECT TO:

Easement #50-CR1320: Road granted to Kitsap County on 12/07/1927 for an indefinite term.

Easement #50-047116: Road granted to E.F. Howerton on 05/09/1985 for an indefinite term.





4/24/15

RECEIVED AND FILED  
IN OPEN COURT

APR 24 2015

DAVID W. PETERSON  
KITSAP COUNTY CLERK

IN THE SUPERIOR COURT OF WASHINGTON  
IN AND FOR KITSAP COUNTY

KITSAP COUNTY, a political subdivision of the  
State of Washington,

Plaintiff,

NO. 15-2-00626-8

v.

KITSAP RIFLE AND REVOLVER CLUB, a not-  
for-profit corporation registered in the State of  
Washington,

Defendant,

and

ORDER GRANTING  
PRELIMINARY INJUNCTION  
WITH FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

IN THE MATTER OF THE UNPERMITTED  
SHOOTING FACILITY located at the 72-acre parcel  
at 4900 Seabeck Highway NW, Bremerton,  
Washington, viz Kitsap County Tax Parcel ID No.  
362501-4-002-1006.

This matter having come on regularly for hearing on the 14th day of April, 2015, on  
Plaintiff Kitsap County's Motion for Preliminary Injunction; Plaintiff having appeared through  
its counsel; Defendant having appeared through its counsel; and the Court having heard oral  
argument and having considered the following:

ORDER GRANTING PRELIMINARY  
INJUNCTION WITH FINDINGS OF  
FACT AND CONCLUSIONS OF LAW -- 1

JUDGE JAY B. ROOF  
Kitsap County Superior Court  
614 Division Street, MS-24  
Port Orchard, WA 98366  
(360)-337-7140

22  
2

1. Plaintiff Kitsap County's Motion for Preliminary Injunction, the Declaration of Christine M. Palmer, with exhibits; and the Declaration of Larry Keeton, with exhibits, filed in support thereof;
2. Defendant KRRC's Response in Opposition to Motion for Preliminary Injunction and the Declaration of Marcus Carter In Opposition to Motion for Preliminary Injunction filed in support thereof; and
3. Plaintiff Kitsap County's Reply In Support of Motion for Preliminary Injunction; the Declaration of James Thralls; and the Second Declaration of Christine M. Palmer, with exhibits, filed in support thereof.

The Court hereby makes the following findings of fact, conclusions of law and orders, which shall remain in effect until further order of this Court:

#### **I. FINDINGS OF FACT**

1. In 2011, the Kitsap County Board of County Commissioners ("the Board") initiated a process to evaluate whether stricter local regulations were warranted to respond to citizen concerns regarding the safety and compatibility issues of shooting ranges.

2. As the result of a formal review process involving public hearings and the taking of written testimony, the Board adopted Ordinance 515-2014 ("KCC 10.25" or "the Ordinance") on September 22, 2014.

3. KCC 10.25 sets forth the procedures for the development and operation of shooting ranges. Specifically, KCC 10.25.090(1)-(2) provides as follows:

(1) Shooting facilities shall be authorized and operated in accordance with an operating permit issued by the department. The operating permit shall govern the facilities and scope of operations of each shooting facility, and shall be issued, denied or conditioned based upon the standards set forth in this article. No proposed or existing shooting facility may operate without an operating permit issued pursuant to this chapter, except as provided in subsection (2) of this section. This operating permit is not intended to alter the legal nonconforming use status and rights of existing ranges, which are governed by Title 17 and the common law, nor shall this operating permit authorize expansion of range uses which otherwise require approval pursuant to a conditional use permit or other land use permits per Title 17. Failure to obtain a range operational permit will result in closure of the range until such time a permit is obtained. Ranges that operate without a permit are

1 subject to code compliance enforcement, including but not limited to injunctive  
2 relief.

3 (2) Each owner or operator of a shooting facility shall apply for and obtain an  
4 operating permit. The owner or operator of a proposed new shooting facility shall  
5 apply for the facility operating permit at the time of application for any necessary  
6 building or land use permits. The owner or operator of an established shooting  
7 facility in active use on the effective date of the ordinance codified in this article  
8 shall apply for the initial facility operating permit not later than ninety days after  
9 the effective date of the ordinance codified in this article. A shooting facility  
10 operating permit is valid for five years from the date of issuance or renewal. The  
11 owner or operator of each facility shall apply for a permit renewal at least thirty  
12 days prior to the date of current permit expiration.

13 4. As set forth above, KCC 10.25 requires that all new and existing shooting ranges  
14 apply for an operating permit within 90 days of the Ordinance's effective date. KCC  
15 10.25.090(2).

16 5. The Ordinance became effective on December 22, 2014. Accordingly, pursuant to  
17 the Ordinance, existing shooting ranges had until March 23, 2015 to submit an application for an  
18 initial facility operating permit.

19 6. Kitsap Rifle and Revolver Club ("KRRC") owns and operates a shooting facility  
20 located at the 72-acre parcel of real property at 4900 Seabeck Highway NW, Bremerton,  
21 Washington, in unincorporated Kitsap County, as identified in the caption to this action (the  
22 "Property"), which is subject to regulation under the Ordinance.

23 7. On December 19, 2014, the Director of Kitsap County's Department of  
24 Community Development, Larry Keeton, sent a letter to Defendant KRRC notifying it of the  
25 Ordinance's requirement to submit an application within 90 days of December 2014. By March  
26 23, 2015, Kitsap County had not received an application from KRRC for an operating permit  
27 under KCC 10.25.  
28

1           8.     On March 26, 2015, Larry Keeton sent another letter notifying KRRC of its  
2 noncompliance with the Ordinance and requesting that an application be sent by March 30, 2015.  
3 KRRC still did not submit an application.  
4

5           9.     KRRC continues to operate a shooting facility without having obtained an initial  
6 facility operating permit under Chapter 10.25 KCC and without having submitted an application  
7 for such a permit.  
8

9           10.    On April 17, 2015, this Court issued a Memorandum Opinion and Order on  
10 Plaintiff's Motion for Preliminary Injunction. The Court's Memorandum Opinion and Order on  
11 Plaintiff's Motion for Preliminary Injunction is incorporated as if fully stated herein.  
12

## 12                               II.     CONCLUSIONS OF LAW

13           1.     The Court has subject matter jurisdiction over the subject of this action;  
14

15           2.     KRRC failed to obtain or submit an application for an initial facility operating  
16 permit by March 23, 2015 in violation of KCC §10.25.090.  
17

18           3.     KRRC continues to operate as a shooting facility and to allow the discharge of  
19 firearms on its property without having obtained or submitted an application for an operating  
20 permit in violation of KCC §10.25.090.  
21

22           4.     This Court has authority to grant an injunction under KCC 10.25.090(1) which  
23 expressly provides for injunctive relief as a method of code enforcement.  
24

25           5.     KRRC's violations of KCC Chapter 10.25 support the conclusion that Kitsap  
26 County is likely to prevail on the merits of its Complaint for Declaratory Judgment and  
27 Injunctive Relief. Kitsap County has a clear legal right to enforce the code provisions of KCC  
28 10.25.090.

1           6.     Kitsap County has a well grounded fear of immediate invasion of its right under  
2     KCC 10.25.090(1) because KRRC has refused to obtain an operating permit and continues to do  
3     so despite notice and requests to do otherwise.

4           7.     KRRC's violations of KCC Chapter 10.25 constitute an actual and substantial  
5     injury to the community pursuant to Washington case law holding that when an ordinance  
6     provides for injunctive relief against violations, this indicates a decision by the legislative body  
7     that the regulated behavior warrants enjoining and thus the violation itself is an injury to the  
8     community.  
9

10           8.     The case of Kitsap County v. Kitsap Rifle and Revolver Club, 184 Wn. App. 252,  
11     337 P.3d 328 (2014) does not preclude Kitsap County from pursuing the present lawsuit (Kitsap  
12     County Superior Court Cause No. 15-2-00626-8). This present lawsuit is not barred under the  
13     doctrine of res judicata, or claim preclusion, because the subject matter and cause of action  
14     giving rise to the claims of these two lawsuits are distinguishable.  
15

16           9.     Defendant's alleged status as a nonconforming use under KCC 17.460.020 does  
17     not exempt it from complying with KCC 10.25. KCC 10.25 is a reasonable police power  
18     regulation imposed for public health and safety.  
19

20           Based upon the foregoing findings of fact and conclusions of law, effective immediately,  
21     the Court hereby orders as follows:  
22

### 23                           **III.    ORDER**

24           1.     Plaintiff Kitsap County's Motion for Preliminary Injunction is GRANTED;

25           2.     Defendant KRRC is enjoined from operating a shooting facility until such time  
26     that Defendant submits a complete application to Kitsap County for an Operating Permit in  
27     compliance with KCC Chapter 10.25;  
28

1           3. Pending trial, Plaintiff is authorized to enforce the cessation of shooting  
2 operations at Defendant's shooting facility;

3           4. Pending trial, KRRC shall prevent any and all persons and entities from  
4 discharging a firearm upon the Property or at the shooting facility thereupon;

5           5. An application for an operating permit submitted by KRRC will be deemed  
6 complete if it includes all the documents identified in KCC 10.25.090(5);

7           6. The injunction will not be lifted until this Court so orders. When Defendant  
8 believes it has submitted a complete application in good faith pursuant to KCC 10.25.090(5),  
9 Defendant shall move for an order lifting the injunction. Defendant bears the burden of  
10 establishing that it has, in good faith, submitted a complete application pursuant to KCC  
11 10.25.090(5).  
12

13           7. After Defendant files a motion to lift the injunction, Kitsap County shall then  
14 have an opportunity to respond to Defendant's motion to present evidence and argument before  
15 the Court as to whether the injunction should be lifted, shall continue, or shall be modified based  
16 upon the extent of Defendant's good faith efforts to comply with KCC 10.25.  
17

18           8. To enforce compliance with this Order and based upon any reported violations of  
19 the same, the Department of Community Development ("DCD") may contact KRRC to request  
20 access to the Property in order to inspect condition or activities reported to be in violation of this  
21 Order and of KCC Chapter 10.25. Upon such request, KRRC shall allow DCD to have  
22 reasonable and timely access to the Property for purposes of such inspections.  
23

24           9. Defendant shall provide Kitsap County and the Court the names and 24-hour  
25 contact information for two KRRC officers who shall be points of contact for any request to  
26 access the Property to verify compliance with this Order and with KCC 10.25.  
27  
28

1           10. If Defendant fails to comply with these orders; Plaintiff may obtain further relief  
2 upon further motion to this Court, including but not limited to contempt sanctions and fines  
3 against Defendant, its officers or members, or any person or entity using the facility for  
4 discharging a firearm;  
5

6           11. This Court retains jurisdiction to enforce this order by all lawful means including  
7 imposition of contempt sanctions and fines.

8           Done in Open Court 22 day of April, 2015.  
9

10  
11   
12 JUDGE JAY ROOF

13 Approved for entry by:

14 TINA ROBINSON  
15 Kitsap County Prosecuting Attorney

16  
17 CHRISTINE M. PALMER, WSBA No. 42560  
18 LAURA F. ZIPPEL, WSBA No. 47978  
19 SHELLEY KNEIP, WSBA No. 22711  
20 Deputy Prosecuting Attorneys  
21 Attorneys for Kitsap County

22 Approved for entry/Presentation waived by:

23 Bruce Danielson, WSBA No. 14018  
24 Danielson Law Office, P.S.  
25 Attorney for Defendant KRRC  
26  
27  
28

ORDER GRANTING PRELIMINARY  
INJUNCTION WITH FINDINGS OF  
FACT AND CONCLUSIONS OF LAW -- 7

JUDGE JAY B. ROOF  
Kitsap County Superior Court  
614 Division Street, MS-24  
Port Orchard, WA 98366  
(360)-337-7140

KRRC – Opening Brief

## **APPENDIX A-5**



1 RECEIVED FOR FILING  
2 KITSAP COUNTY CLERK

3 MAY 3 1 2016

4 DAVID W. PETERSON

5  
6  
7  
8 SUPERIOR COURT OF THE STATE OF WASHINGTON  
9 FOR KITSAP COUNTY

10 KITSAP COUNTY, a political subdivision  
11 of the State of Washington,

12 Plaintiff,

No. 15-2-00626-8

13 v.  
14

15 KITSAP RIFLE AND REVOLVER CLUB,  
16 a not-for-profit corporation registered in the  
17 State of Washington,

18 Defendant,

19 and

20 IN THE MATTER OF THE  
21 UNPERMITTED SHOOTING FACILITY  
22 located at the 72-acre parcel at 4900  
23 Seabeck Highway NW, Bremerton,  
Washington, viz Kitsap County Tax Parcel  
ID No. 362501-4-002-1006.

MEMORANDUM OPINION AND ORDER  
ON PLAINTIFF KITSAP COUNTY'S  
MOTION FOR SUMMARY JUDGMENT  
RE: DECLARATORY RELIEF AND  
PERMANENT INJUNCTION AND  
PLAINTIFF'S MOTION TO DISMISS  
COUNTERCLAIMS

24  
25 THIS MATTER came on for hearing on April 20, 2016, on Kitsap County's Motion  
26 for Summary Judgment and Kitsap County's Motion to Dismiss Counterclaims. Plaintiff  
27 appeared through counsel Christine Palmer and Laura Zippel; Defendant Kitsap County  
28 Rifle and Revolver Club ("KRRC") appeared through counsel Dennis Reynolds and Bruce  
29 Danielson. At the April 20<sup>th</sup> hearing the County stated it no longer seeks a permanent  
30

MEMORANDUM OPINION  
AND ORDER

- 1 -

JUDGE JAY B. ROOF  
Kitsap County Superior Court  
614 Division Street, MS-24  
Port Orchard, WA 98366  
(360) 337-7140

1 injunction but still seeks a declaratory ruling regarding Kitsap County Code Chapter 10.25  
2 and its applicability to KRRC as a matter of law. In ruling on these motions, this Court has  
3 reviewed and considered all pleadings and filings in this matter and oral argument of both  
4 parties.<sup>1</sup>

### 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30

## FACTUAL HISTORY

In 2011, the Kitsap County Board of County Commissioners began evaluating whether stricter local regulations were warranted to respond to citizen complaints regarding the safety and compatibility of shooting ranges. A proposed ordinance was created, a review process undergone, and Ordinance 515-2014 ("KCC 10.25") was adopted September 22, 2014, effective December 22, 2014.

KCC 10.25 provides procedures for the development and operation of shooting ranges. The provisions pertinent to this lawsuit, KCC 10.25.090(1)-(2), provide as follows:

(1) Shooting facilities shall be authorized and operated in accordance with an operating permit issued by the department. The operating permit shall govern the facilities and scope of operations of each shooting facility, and shall be issued, denied or conditioned based upon the standards set forth in this article. No proposed or existing shooting facility may operate without an operating permit issued pursuant to this chapter, except as provided in subsection (2) of this section. This operating permit is not intended to alter the legal nonconforming use status and rights of existing ranges, which are governed by Title 17 and the common law, nor shall this operating permit authorize expansion of range uses which otherwise require approval pursuant to a conditional use permit or other land use permits per Title 17. Failure to obtain a range operational permit will result in closure of the range until such time a permit is obtained. Ranges that operate without a permit are subject to code compliance enforcement, including but not limited to injunctive relief.

(2) Each owner or operator of a shooting facility shall apply for and obtain an operating permit. The owner or operator of a proposed new shooting facility shall apply for the facility operating permit at the time of application for any necessary building or land use permits. The owner or

---

<sup>1</sup> Including Defendant/Counterclaimant's Notice of Supplemental Authority in Response to Kitsap County's Motion for Summary Judgment, filed May 26, 2016; and Kitsap County's Response to KRRC's Notice of Supplemental Authority in Response to Kitsap County's Motion for Summary Judgment, filed May 25, 2016.

1 operator of an established shooting facility in active use on the effective  
2 date of the ordinance codified in this article shall apply for the initial  
3 facility operating permit not later than ninety days after the effective date  
4 of the ordinance codified in this article. A shooting facility operating  
5 permit is valid for five years from the date of issuance or renewal. The  
owner or operator of each facility shall apply for a permit renewal at least  
thirty days prior to the date of current permit expiration.

6 The relevant provisions provide that all new and existing shooting ranges apply for  
7 an operating permit within 90 days of the Ordinance's effective date.<sup>2</sup>

8 On December 19, 2014, the Director of the County's Department of Community  
9 Development, Larry Keeton, sent a letter to KRRC notifying it of the new ordinance's  
10 requirement to submit an application within 90 days of December 22, 2014. KRRC is a  
11 nonprofit organization which operates a shooting facility in Bremerton, Washington  
12 ("Club"), and has been in operation for more than 80 years. The Club is private but is open  
13 to the public for certain instructional classes.

14 KRRC did not submit an application within the 90 day deadline. On March 26,  
15 2015, Larry Keeton again sent a letter to KRRC informing it of its noncompliance with the  
16 ordinance and requesting that an application be sent by March 30, 2015. No application  
17 was received.

18 On March 31, 2015, Kitsap County filed its complaint against KRRC, asserting one  
19 count of violation of the Firearms Discharge Ordinance under KCC 10.25, and requesting  
20 declaratory and injunctive relief. On April 2, 2015, the County filed a Motion for  
21 Preliminary Injunction, which was granted by Order entered April 24<sup>th</sup>.

22 On March 17, 2016, KRRC filed a motion to dissolve the preliminary injunction,  
23 arguing that it had filed a complete application for an operating permit, thus complying  
24 with the terms of the preliminary injunction order. KRRC submitted the application "under  
25 protest," preserving the Club's rights to continue to contest the requirement of an operating  
26 permit for its activities. The County argued that the application was not "complete" within  
27 the meaning of the April 24<sup>th</sup> Order, and therefore the injunction should remain.

28  
29  
30  

---

<sup>2</sup> KCC 10.25.090(2).

1 An evidentiary hearing was scheduled to occur on April 7, 2016, to determine  
2 whether KRRC had filed a "complete" application, as required by the Court's April 24,  
3 2015 Order. At the evidentiary hearing the County no longer opposed the lifting of the  
4 preliminary injunction, thus, KRRC's Motion to Dissolve Preliminary Injunction was  
5 granted by Order entered April 7, 2016.

6 With the injunction now lifted, the motion for summary judgment came on for  
7 hearing on April 20, 2016, along with the County's Motion to Dismiss KRRC's  
8 counterclaims, and KRRC's Motion to File Amended Answer, Affirmative Defenses and  
9 Counterclaims ("Motion to Amend"). At the Hearing, the Court granted KRRC's Motion to  
10 Amend and took the County's motions under advisement.<sup>3</sup> At the hearing, the County  
11 stated that it no longer seeks a permanent injunction, and that it only seeks a declaratory  
12 judgment regarding KCC 10.25 and its enforceability in regard to KRRC.

### 13 ANALYSIS

14 Before the Court is the County's Motion for Summary Judgment and the County's  
15 Motion to Dismiss KRRC's Counterclaims. In light of granting KRRC's Motion to Amend  
16 on April 20, 2016, the Court will deny the County's Motion to Dismiss KRRC's  
17 Counterclaims without prejudice. The County may refile the motion in light of the  
18 amended counterclaims and this Order, if it so chooses.

19 Kitsap County's summary judgment motion requests an order declaring that  
20 KRRC's operation of a shooting range without an operating permit violates KCC 10.25.  
21 When faced with a motion for summary judgment the Court determines whether any  
22 genuine issues of material fact exist and whether the moving party is entitled to judgment  
23 as a matter of law.<sup>4</sup> All facts and reasonable inferences are viewed in the light most  
24

25  
26 <sup>3</sup> Plaintiff filed the present Motion for Summary Judgment Re: Declaratory Relief and Permanent Injunction  
27 on May 4, 2015, however the matter was delayed several times and was not argued until April 20, 2016. The  
28 motion was originally noted for hearing on June 22, 2015, but was set over while KRRC sought discretionary  
29 review from the Court of Appeals of this Court's Memorandum Opinion and Order granting Plaintiff's  
30 Motion for Preliminary Injunction. The County renoted the hearing for August 24, 2015, and before the  
hearing occurred, renoted it again for November 16, 2015. KRRC filed a Rule 56(f) Continuance of the  
November 16th hearing, which the Court granted.

<sup>4</sup> *Clark v. Falling*, 92 Wn. App. 805, 808-09, 965 P.2d 644 (1998).

1 favorable to the nonmoving party.<sup>5</sup> The application of a statute is a matter of law.<sup>6</sup> This  
2 Court has the power to declare rights, status and other legal relations by declaratory  
3 judgment.<sup>7</sup>

4 The County argues that KCC 10.25 applies to KRRC, and therefore, any operation  
5 of the Club as a shooting range without the operating permit is in violation of the Kitsap  
6 County Code. KRRC argues that KCC 10.25 does not apply to the Club because (1) KRRC  
7 has an equitable servitude in the property, allowing it to continue operations without further  
8 approval or regulation from the County; (2) the intent of the Deed raises a genuine issue of  
9 material fact; and (3) the area of firearm regulation is preempted by the State of  
10 Washington, RCW 9A.290.<sup>8</sup>

11 **I. The 2009 Bargain and Sale Deed with Covenants did not grant the Club an**  
12 **equitable servitude, nor does it raise a genuine issue of material fact**

13 In 2009, by way of a Bargain and Sale Deed with Covenants ("Deed"), the County  
14 conveyed all of its "right, title, and interest" in the shooting range property directly to  
15 KRRC. The Club argues that the "dealings back-and-forth"<sup>9</sup> between the County and  
16 KRRC during negotiations over the land swap created an equitable servitude, either  
17 expressly or by estoppel, and that this equitable servitude "is enforceable as a property right  
18 and a land use approval that specifically allows the continuation of the gun range  
19 operations if certain conditions are met – which they are."<sup>10</sup> KRRC alleges that it relied on  
20  
21  
22

23 <sup>5</sup> *Wuthrich v. King Cty.*, 185 Wn.2d 19, 24, 366 P.3d 926 (2016).

24 <sup>6</sup> *Lund v. Benham*, 109 Wn. App. 263, 267, 34 P.3d 902 (2001).

25 <sup>7</sup> RCW 7.24.010.

26 <sup>8</sup> KRRC also argues that (1) as a legal non-conforming use, the Club is exempt from KCC 10.25; (2) that  
27 KCC 10.25 is unconstitutionally vague; (3) that KCC 10.25 operates as a substantial impairment of a  
28 contractual relationship; (4) that KCC 10.25 unconstitutionally limits the right to bear arms; and (5) that KCC  
29 10.25 conflicts with the Growth Management Act, RCW 36.70A.200. The Court finds these arguments to be  
30 without merit.

<sup>9</sup> KRRC alleges that it "reasonably relied on the County's representations and decided to enter the land swap  
transaction after lengthy negotiations that allowed the Club's concerns about future regulation of its  
operations to be put at ease." KRRC's Supplemental Response in Opposition to Kitsap County's Motion for  
Summary Judgment ("KRRC Supp. Resp."), at 4.

<sup>10</sup> KRRC's Supp. Resp., at 4.

1 the County's representations during the land swap negotiations<sup>11</sup> and summary judgment is  
2 inappropriate because a genuine issue of material fact exists as to the exact intent of the  
3 Deed.

4 The County argues that the intent of the parties in connection with the land transfer  
5 agreement was already determined by the Court of Appeals in *Kitsap County v. Kitsap Rifle*  
6 *and Revolver Club*, 184 Wn. App. 252, 337 P.3d 328 (2014) ("*Kitsap Rifle*"), and therefore  
7 KRRC is not allowed a second bite at the apple on an argument that has already been  
8 denied. The Court of Appeals held that "[i]t would be unreasonable to view a restrictive  
9 covenant in the deed as an affirmative ratification of past development and a waiver of  
10 future development permitting violations."<sup>12</sup> Therefore, the County argues, "[i]t would be  
11 just as unreasonable to interpret the restrictive covenants in the Deed as an exemption from  
12 future regulation under an equitable servitude argument."<sup>13</sup>

13 The Court of Appeals has already made a final determination as to the intent and the  
14 agreement of the parties with respect to the Deed transfer, and the issue will not be re-  
15 litigated here. Therefore, there is no genuine issue of material fact before this Court as to  
16 the intent of the Deed. Further, KRRC has failed to put forward any evidence supporting its  
17 contention that it relied on a representation from the County that it would be free from  
18 County regulations going forward as part of the land swap. Finally, an equitable servitude  
19 is a restriction on property that runs with the land, and KRRC offers no authority for the  
20 proposition that an equitable servitude could exempt KRRC from future regulation by the  
21 County under Washington law. Thus, KRRC's equitable servitude arguments fail.

## 22 II. KCC 10.25 is not preempted by State law

23 KRRC argues that KCC 10.25 is void on its face because it is preempted by  
24 RCW 9.41.290, which states that "[t]he state of Washington hereby fully occupies and  
25 preempts the entire field of firearms regulation within the boundaries of the state."<sup>14</sup> An  
26

27 <sup>11</sup> KRRC has not put forward any evidence to support its assertion that it would not have agreed to the land  
28 transfer absent a promise that it would be free from regulation.

29 <sup>12</sup> *Kitsap Rifle*, 184 Wn. App. at 292.

30 <sup>13</sup> Kitsap County's Supplemental Reply in Support of Motion for Summary Judgment, at 3.

<sup>14</sup> RCW 9.41.290 states in its entirety:

1 exception is found in RCW 9.41.300(2), which allows cities, towns, counties and other  
2 municipalities to enact ordinances that restrict the discharge of firearms where "there is a  
3 reasonable likelihood that humans, domestic animals, or property will be jeopardized."  
4 KRRC argues that "[n]owhere in the recitals supporting adoption of KCC 10.25, is there  
5 any claim, assertion, or finding that there is a reasonable likelihood of jeopardy as required  
6 by RCW 9.41.300(2)."<sup>15</sup>

7 The County argues that KCC 10.25 is not a firearm regulation, and because Chapter  
8 9.41 RCW "does not impose civil regulations on the operation of recreational and/or  
9 sporting facilities on which firearms may be discharged" preemption does not apply.<sup>16</sup> In  
10 the alternative, the County argues that the RCW 9.41.300(2) exception applies, and that the  
11 legislation itself did not need to expressly include a legislative finding as to the reasonable  
12 likelihood of jeopardy to humans, domestic animals, or property.

13 Nothing in KCC 10.25 directly regulates the registration, licensing, possession,  
14 purchase, sale, acquisition, transfer, discharge, or transportation of firearms. Where a  
15 shooting range fails to obtain an operating permit, as required by KCC 10.25, the law  
16 impacts the right to discharge firearms indirectly, and only in the narrow circumstance of  
17 discharging firearms in the use of the shooting range facility. KRRC does not offer any  
18 authority that such an indirect and narrow impact on firearms discharge is preempted by  
19 RCW 9.41.290. Therefore, KCC 10.25 is not preempted by RCW 9.41.290.

20 And even if KCC 10.25 did directly regulate the discharge of firearms, the RCW  
21 9.41.300(2) exception applies. As stated in *Kitsap Rifle*,

22  
23 The state of Washington hereby fully occupies and preempts the entire field of firearms  
24 regulation within the boundaries of the state, including the registration, licensing,  
25 possession, purchase, sale, acquisition, transfer, discharge, and transportation of firearms,  
26 or any other element relating to firearms or parts thereof, including ammunition and  
27 reloader components. Cities, towns, and counties or other municipalities may enact only  
28 those laws and ordinances relating to firearms that are specifically authorized by state law,  
29 as in RCW 9.41.300, and are consistent with this chapter. Such local ordinances shall have  
30 the same penalty as provided for by state law. Local laws and ordinances that are  
inconsistent with, more restrictive than, or exceed the requirements of state law shall not be  
enacted and are preempted and repealed, regardless of the nature of the code, charter, or  
home rule status of such city, town, county, or municipality.

<sup>15</sup> KRRC's Citation of Additional Case Authority, at 2.

<sup>16</sup> County's Response to KRRC's Citation of Additional Authority, at 2.

1 [t]he trial court made unchallenged findings that (1) the Club's property was  
2 a "blue sky" range, with no overhead baffles to stop accidentally or  
3 negligently discharged bullets, CP at 4070; (2) more likely than not, bullets  
4 have escaped and will escape the Club's shooting areas and possibly will  
5 strike persons or property in the future based on the firearms used at the  
6 range, vulnerabilities of neighboring residential property, allegations of  
7 bullet impacts in nearby residential developments, evidence of bullets  
lodged in trees above berms, and the opinions of testifying experts; and (3)  
the Club's range facilities, including safety protocols, were inadequate to  
prevent bullets from leaving the property.<sup>17</sup>

8 The trial court's findings in *Kitsap Rifle* show there was a reasonable likelihood that  
9 humans, domestic animals, or property were jeopardized when the ordinance was put into  
10 place. KRRC does not offer any authority for the proposition that RCW 9.41.300(2)  
11 requires KCC 10.25 to have included such finding in the regulation itself. Therefore, even  
12 if KCC 10.25 is considered to be a regulation of the discharge of firearms, the regulation is  
13 permissible under the exception.

14 As stated in *Kitsap Rifle*, "[t]he County's sale of the land even for the purpose of  
15 facilitating the Club's continued existence does not prevent the County from insisting that it  
16 be operated in a manner consistent with the law."<sup>18</sup> Despite the Club's insistence to the  
17 contrary, KCC 10.25 is enforceable against KRRC's shooting range facility, and operation  
18 of the shooting facility without an operating permit is a violation of Chapter 10.25 KCC.

19 **ORDER**

20 It is hereby

21 **ORDERED** that Plaintiff Kitsap County's Motion for Summary Judgment Re:  
22 Declaratory Relief is **GRANTED**; it is further

23 **ORDERED** that Plaintiff Kitsap County's Motion to Dismiss KRRC's  
24 Counterclaims is **DENIED** without prejudice.

25 Dated: This 31<sup>st</sup> day of May, 2016.

26   
27 JUDGE ROOF  
28

29 <sup>17</sup> *Kitsap Rifle*, 184 Wn. App. at 283.

30 <sup>18</sup> *Kitsap Rifle*, 184 Wn. App. at 293.



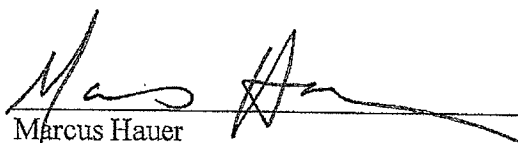
CERTIFICATE OF SERVICE

I, Marcus Hauer, certify under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above entitled action, and competent to be a witness herein.

Today, I caused a copy of the foregoing document to be served in the manner noted on the following:

Christine Palmer Kitsap County Prosecutors Office MS 35A 614 Division St Port Orchard, WA 98366-4614	<input checked="" type="checkbox"/> Via Interdepartmental Mail <input checked="" type="checkbox"/> Via Email: cmpalmer@co.kitsap.wa.us
Bruce Danielson Danielson Law Office PS 1001 4th Ave Ste 3200 Seattle, WA 98154-1003	<input checked="" type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via Email: bruce@brucedanielsonlaw.com
Dennis D. Reynolds Dennis D. Reynolds Law Office 200 Winslow Way W Unit 380 Bainbridge Island, WA 98110-4932	<input checked="" type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via Email: dennis@ddrlaw.com

DATED this 31<sup>st</sup> day of May 2016, at Port Orchard, Washington.

  
Marcus Hauer  
Judicial Law Clerk

# DENNIS D REYNOLDS LAW OFFICE

**January 03, 2017 - 4:31 PM**

## Transmittal Letter

Document Uploaded: 7-491303-Appellant's Brief.pdf

Case Name: Kitsap County v, Kitsap Rifle and Revolver Club

Court of Appeals Case Number: 49130-3

**Is this a Personal Restraint Petition?** Yes ☐ No

### The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

☒ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Jon Brenner - Email: [jon@ddrlaw.com](mailto:jon@ddrlaw.com)

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